

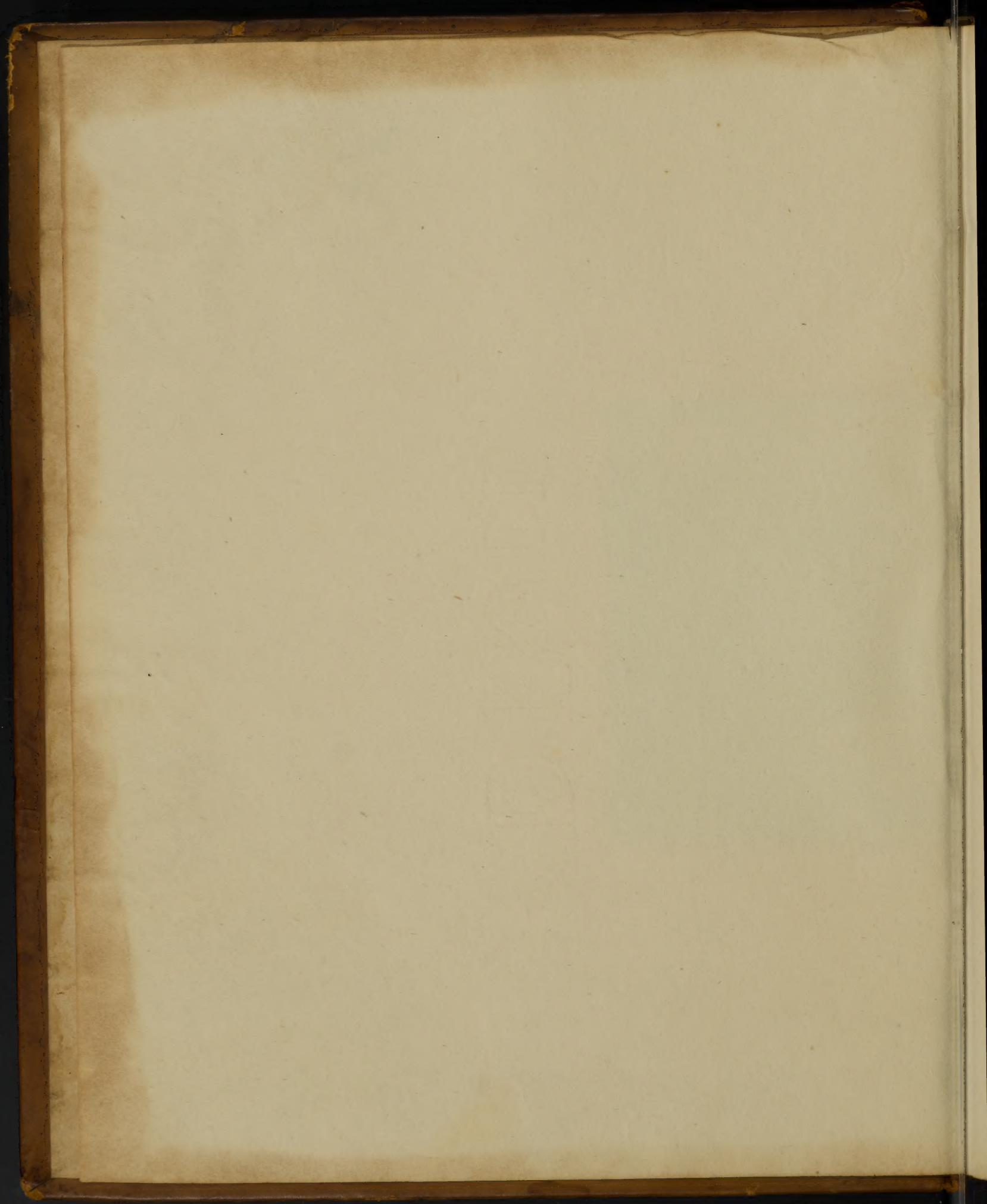
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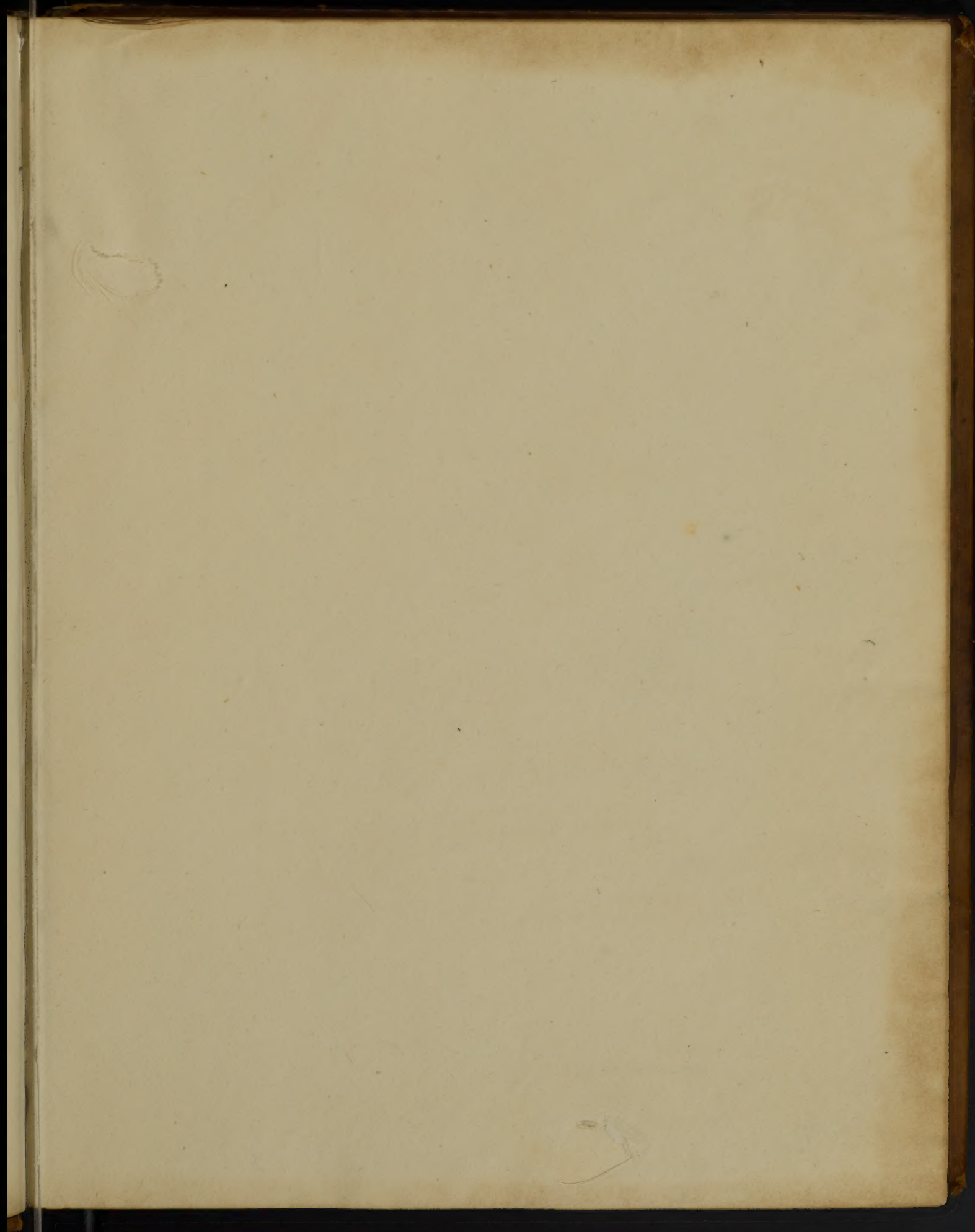
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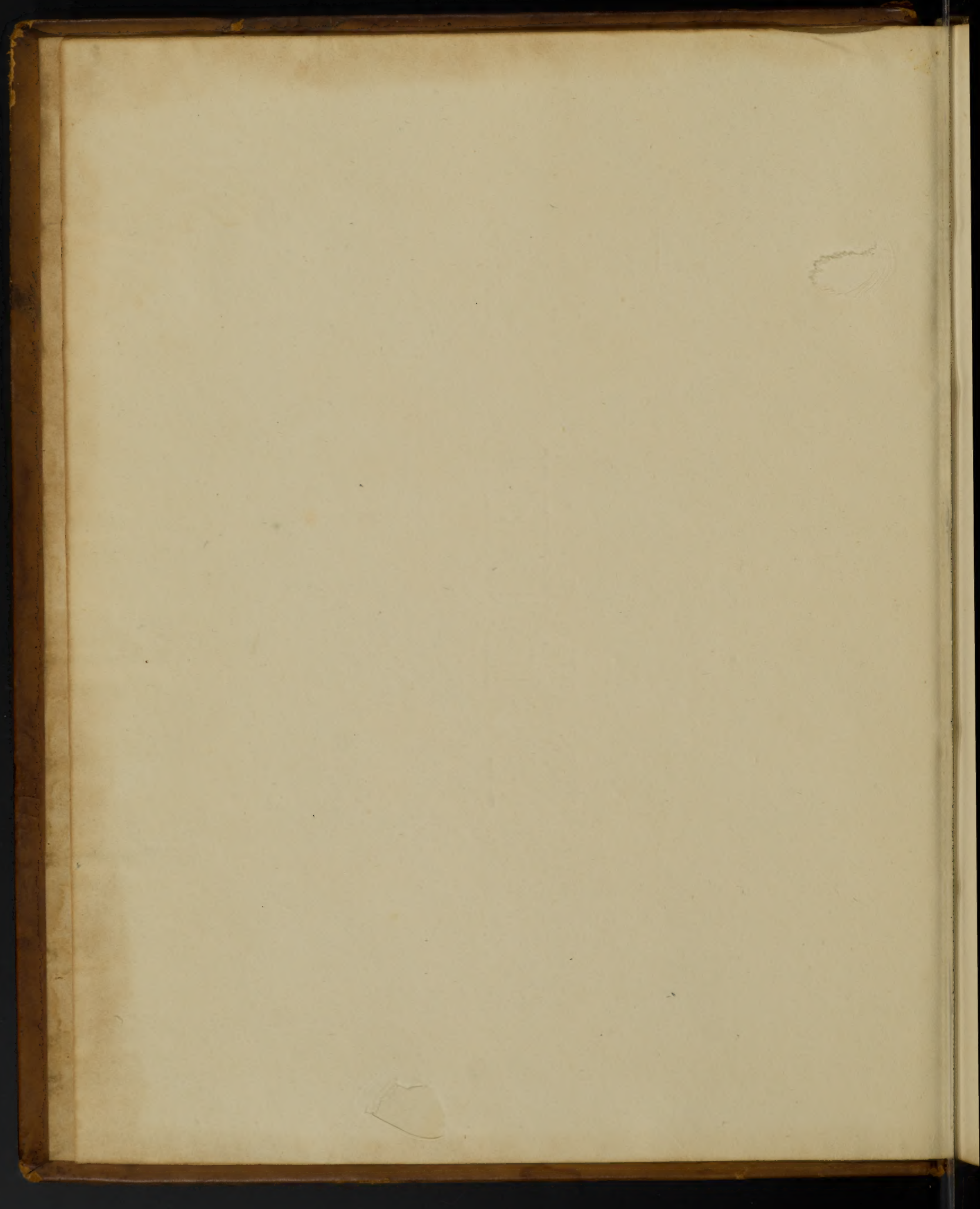
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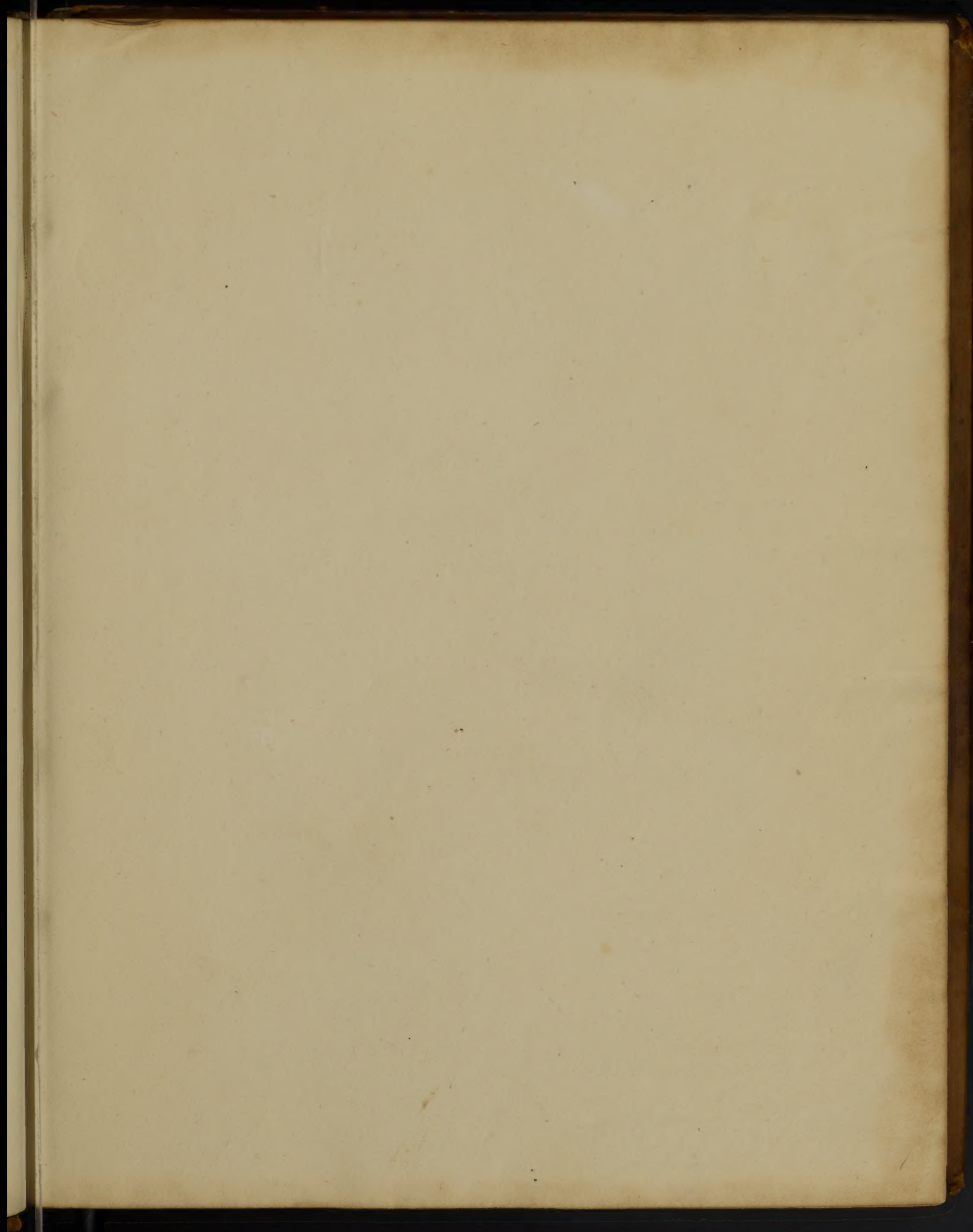
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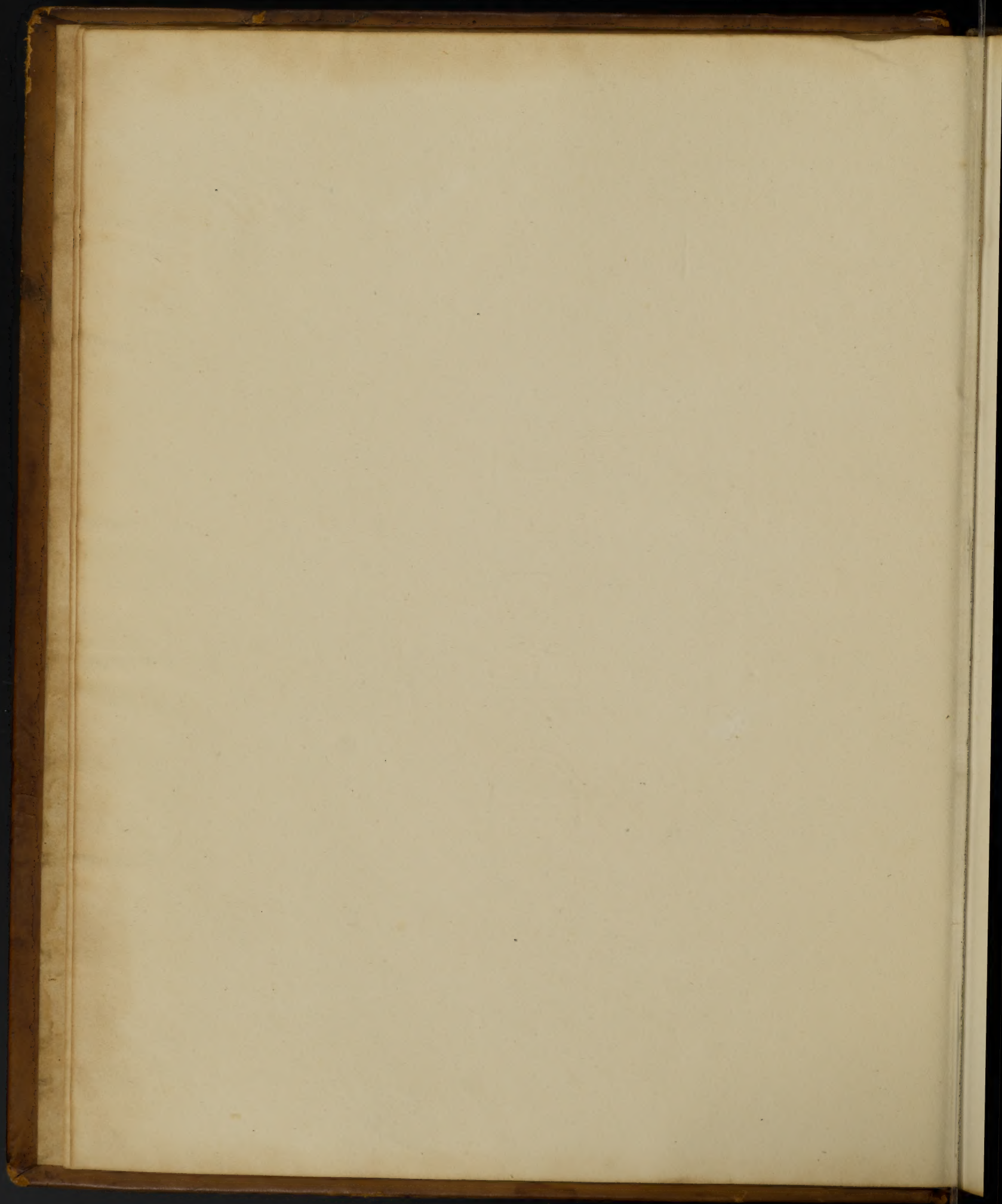


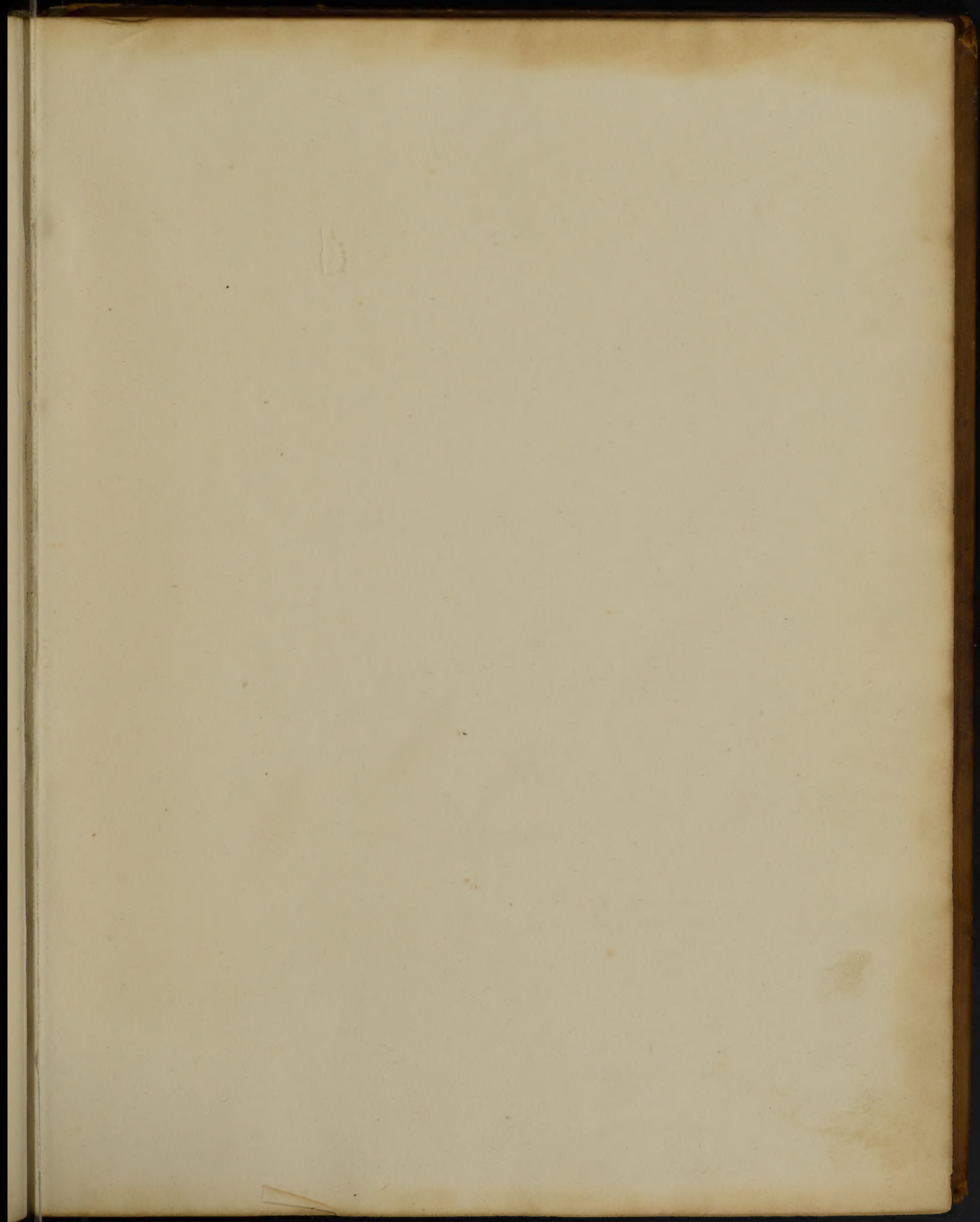


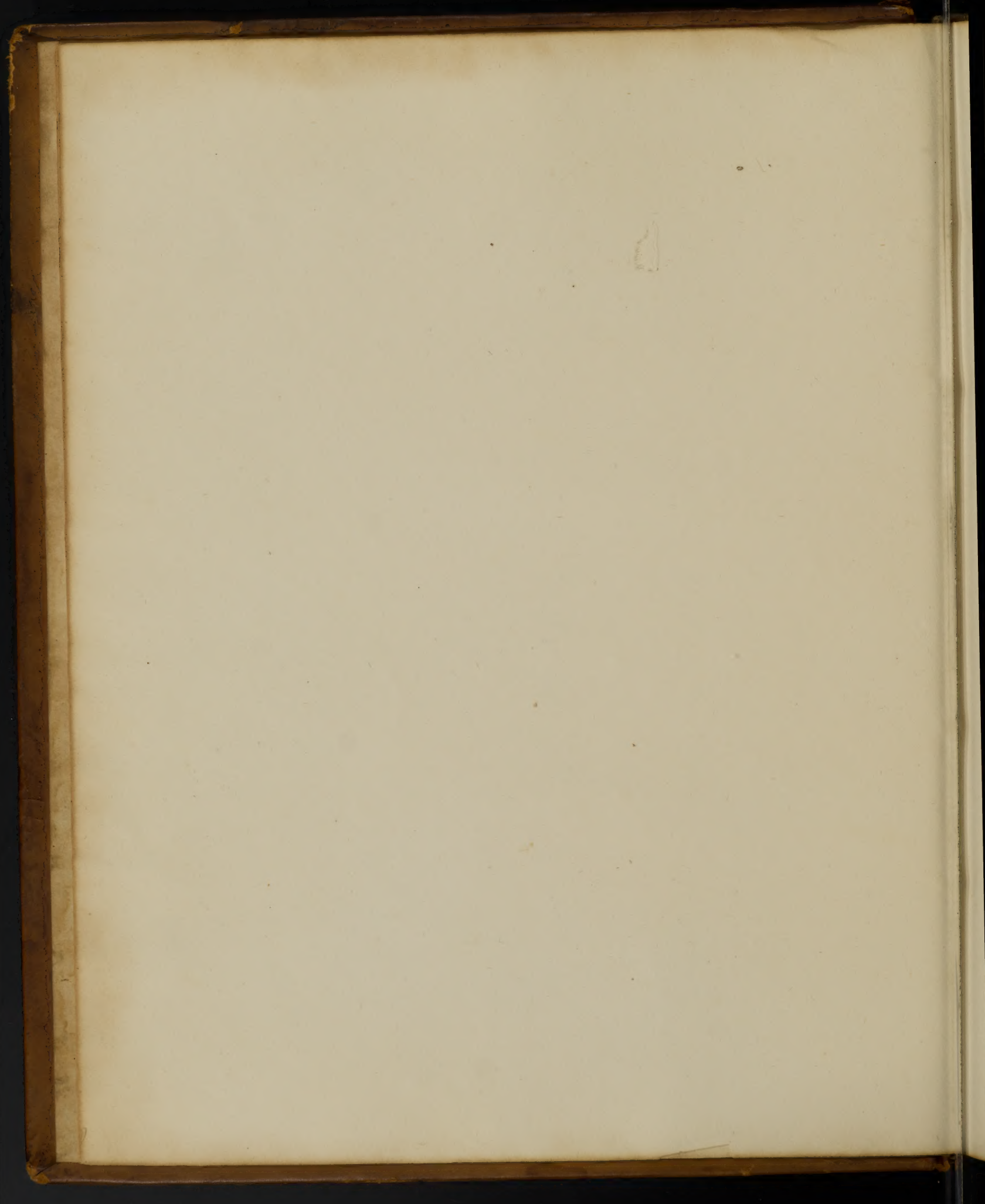


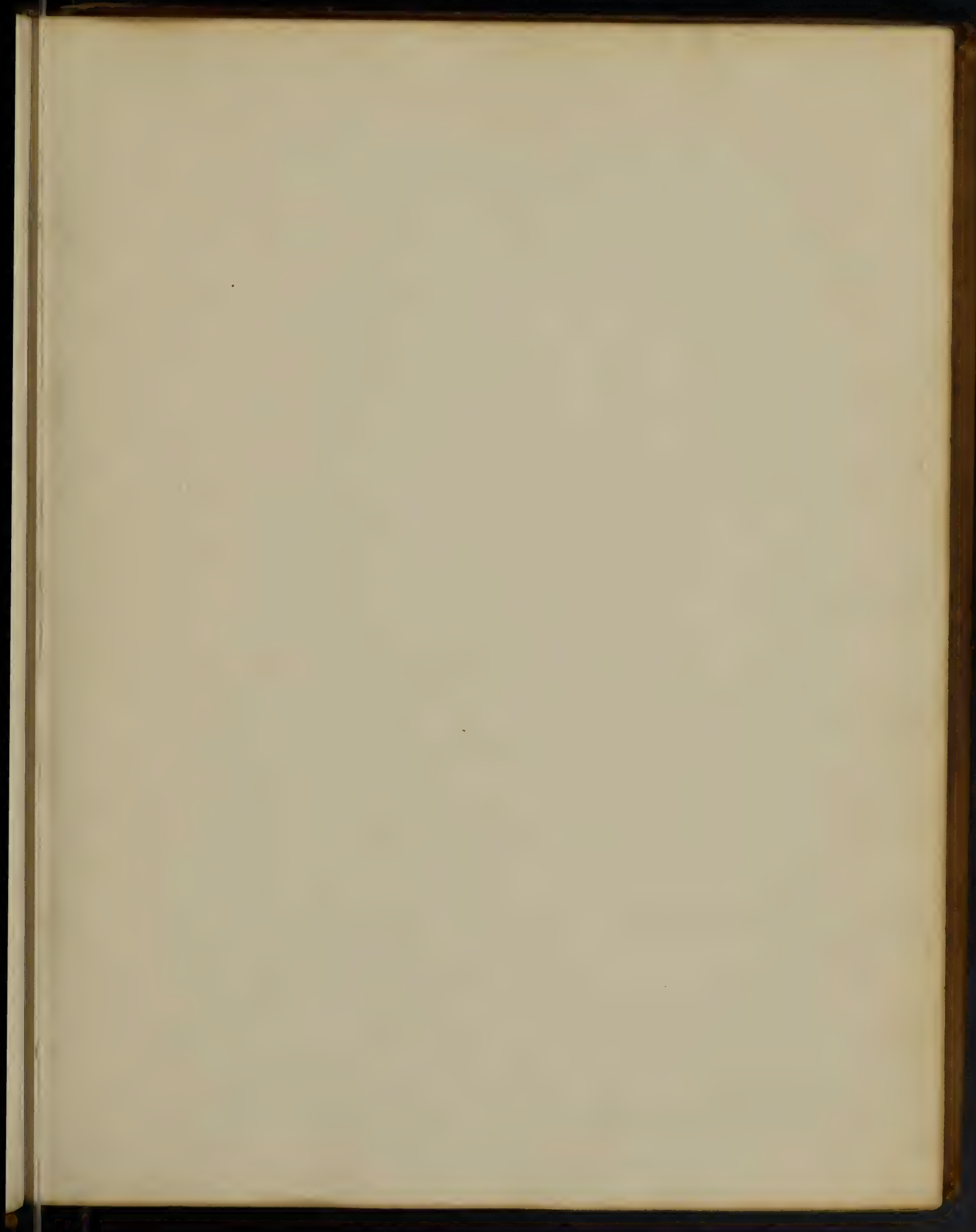


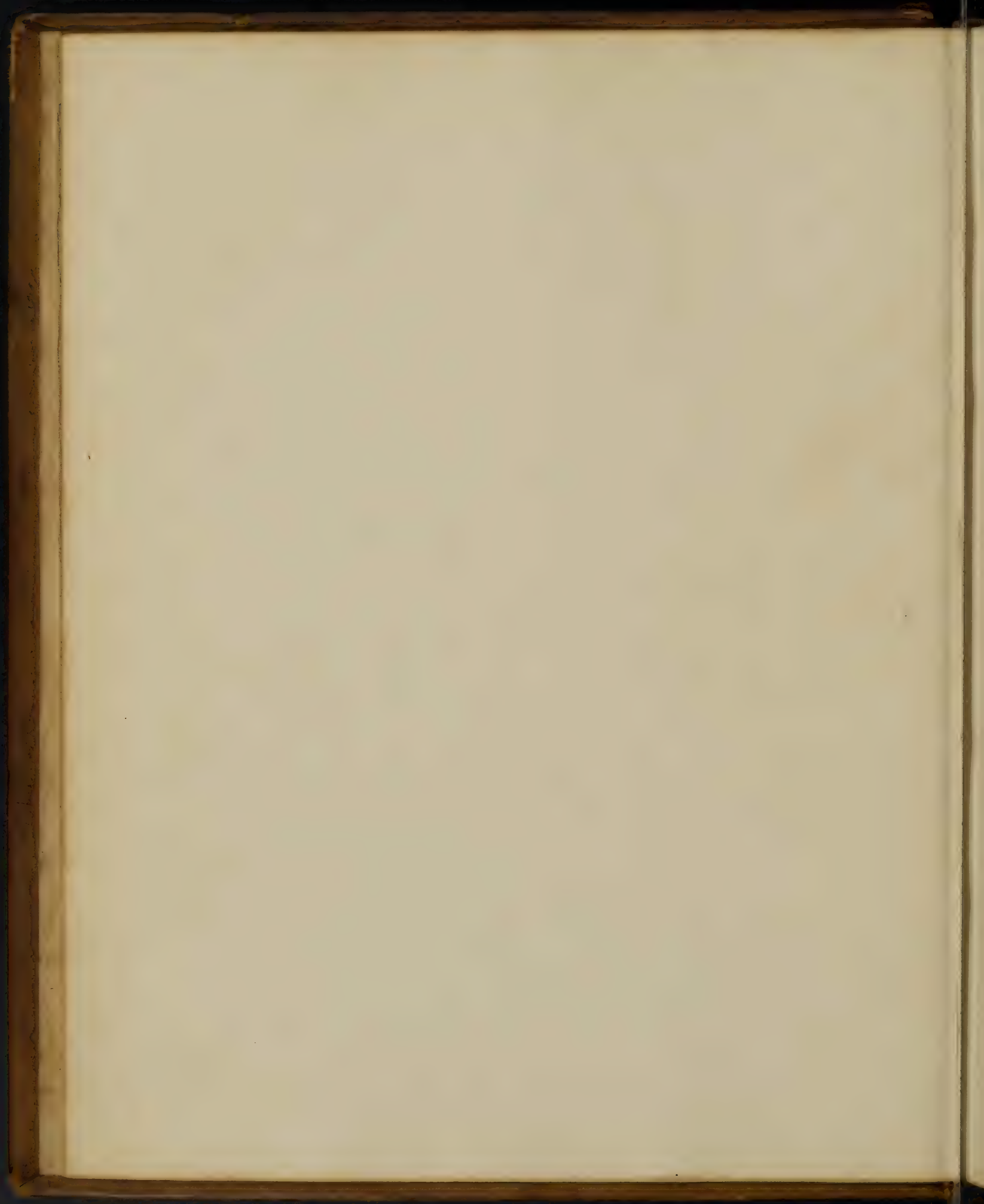


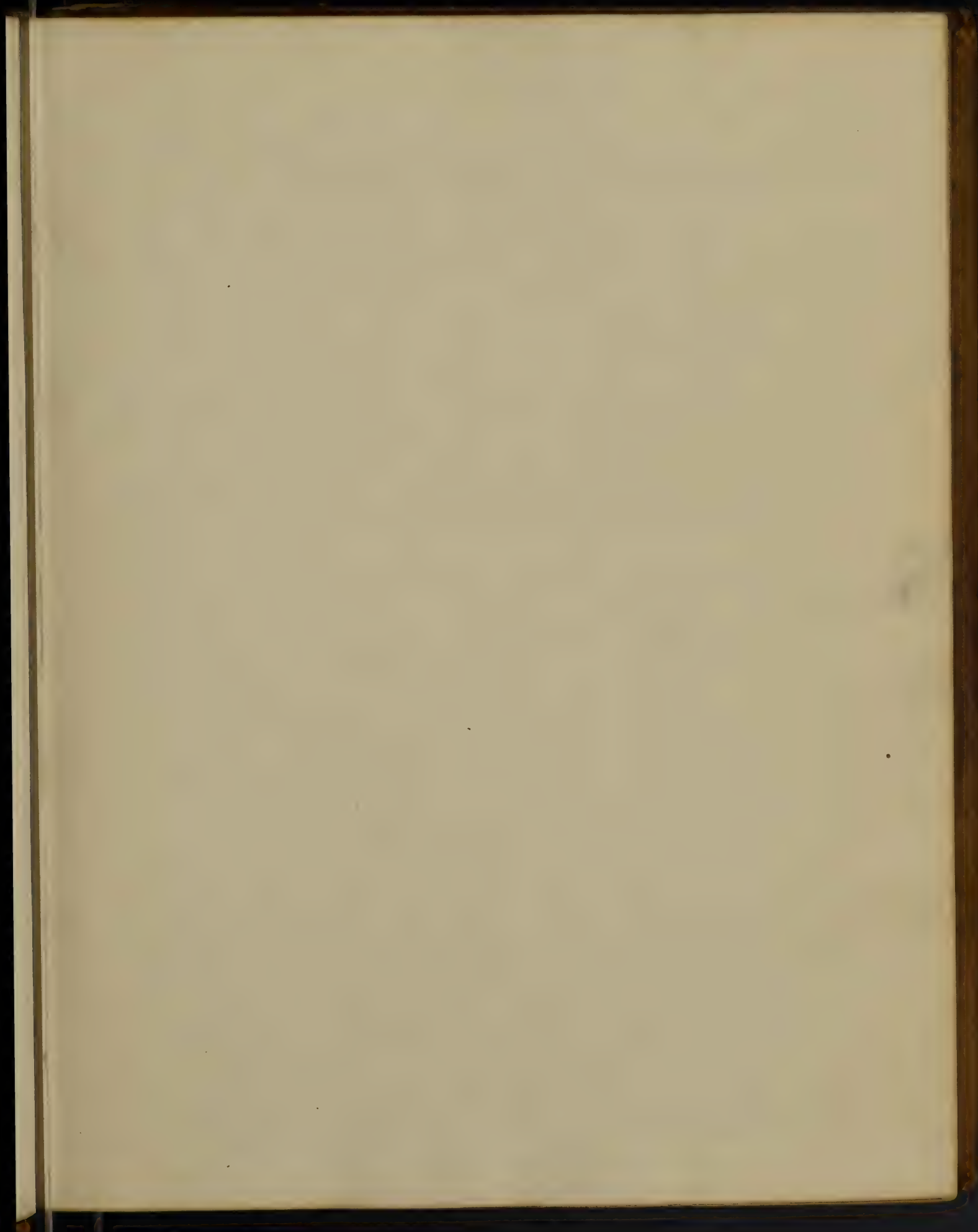












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Evidence. 3. Judge Hunt at 25. 1840.

With respect to the doctrine of Evidence, there is an infinite variety of questions arising in a Court of Justice which are entirely new. I cannot in treating the subject go into a detail of every one of them. But there are certain principles well established & a thorough acquaintance with a knowledge of them is necessary. I would remark that there are more incorrect decisions in points of Evidence than on any other branch of the Law. This may be accounted for, from the necessity that the Court should render their decisions on the spur of the occasion, without giving themselves time for mature reflection. It therefore becomes more necessary to obtain a thorough & correct knowledge of this subject, than most others. I shall make the present, a preliminary lecture. I shall not give you any authorities to day but merely some general, prefatory observations.

And in the first place I would remark, that it is a common practice for many persons, & even writers themselves to confound the terms "Evidence" & "Testimony" and "Evidence" & "Testimony" & it is possible I may myself confound them by chance, but you will understand what I mean. The persons brought into Court to testify are called "Witnesses" - what they say is "Testimony" - & this Testimony is "Evidence" - that is it is so provided it convinces or has a tendency to convince the mind as to the fact testified to. So it is Evidence to every one

Evidence.

for evidence in itself. It is stronger or weaker evidence as it tends more or less to prove to a belief.

The different kinds of testimony from which this Evidence is derived are three.

1st. Written Evidence. This includes all that Evidence to be derived from any writing from the Court instruments up to Specialties, us &c records &c. A promissory note, for instance, made by A. B. is Evidence what is called written. But if A. B. denies the signing, you must prove the fact, & this may be done by parol. That being done the Evidence is complete. It is then partly parol & partly written Evidence. The writing must be produced. It is therefore written testimony, the parol is introduced to help it out.

2nd. Parol Testimony. This is derived from the mouth of witnesses. And here it makes no difference whether it is delivered in Court or by deposition. A witness's testimony reduced to writing, does not make it written testimony. A Deposition is parol testimony reduced to writing by the proper officer or person appointed. The rules relating to written testimony do not apply to depositions. The rules relating to parol testimony are the only ones which are applicable.

3rd. Presumptive Evidence. This is derived from either parol or written testimony. If so, it may be asked why makes a distinct class? For this reason. In its technical sense, written or parol testimony is to be understood as going directly to prove the fact in question. But presumptive testimony goes to prove

(Evidence.)

a fact or a set of facts from which the principal fact is inferred. Now the fact or facts, would you can't help concluding that the principal fact has taken place. The identical fact is not proved. e.g. suppose the question is, whether, A. T. was in Town yesterday. It swears that at 10 o'clock he saw him on a white horse coming towards the Town being about one mile from it. A. T. swears that at 11 o'clock he saw him going from the Town on a white horse, being then about $\frac{3}{4}$ of a mile from the Town & A. T. who was in the Meeting house in Town swore that about $\frac{1}{2}$ past 10 o'clock he was looking out of the window, & saw a man riding past on a white horse & he believed it was A. T. but he was so muffled up that he can't tell positively. Now from all these facts I may fairly be presumed or inferred that A. T. was in Town yesterday - one man saw him on the road which leads to the Town & coming towards it & describes his Horse - another saw him on the road going from Town & on a similar horse & believes the times that these 2 men saw him a man in Town saw somebody who he believed was A. T. & on a similar Horse.

Sometimes presumptive evidence is the best in the world - sometimes there is room to doubt, but that alone is not to hinder you from deciding. You must decide as a reasonable person would now in the above case there might be some good holes to get out at - & it might possibly be that A. T. was not in Town. But from all the circumstances it is

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impossible for you to draw any other conclusion is that that he was actually in town. This presumption evidence is sufficiently strong.

You may frequently hear it said, at the bar, that the evidence must leave the mind clear of doubt. This is not so as appears in the example above - the proof is sufficient to satisfy the mind of a reasonable man. A doubt might exist in almost every case. There are to be sure some possible cases where according to the laws of nature, are entirely clear of doubt. As suppose at 10 o'clock at night the sky is perfectly clear. & in the morning we see that there has fallen a heavy snow, & the Q. is whether there were clouds last night - every man being in bed we are to suppose no mortal actually saw the clouds. Yet from the circumstance of its snowing we are to see, there were clouds. The case is clear of doubt. You are not to bring it to that - that it must leave the mind clear of doubt. It is very important to get a correct idea of presumptive evidence. You may hear it said that the evidence must be clear, else you cannot convict. This is incorrectly laid down. They say the presumption must be violent. Now what is violent presumption? Why that which convinces the mind clearly that the thing must have taken place. It is sometimes stronger than an oath, as will appear from the following case. A woman was indicted for burning a barn. Now if some person had seen she burned it, his testimony might have been disbelieved,

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but from presumptive evidence it was clear that she was guilty. The facts were these. It was proved that she had sworn to be acquainted with A. W. who was guilty of the Barn. & on this alone was not sufficient to convict her. They next proved there was a light shoe on the ground & that they measured the track & it suited her shoe exactly, & that there being a defect in the sole of the shoe the same defect was plainly visible in the track. This conducted still more to a conviction of her guilt. They proved still farther that a short distance from the Barn they found an earthen porringer with dead coals in it. & this being of a singular description of ware was known to belong to the house where she lived. This was an additional circumstance. but further they proved that in going to the Barn from where she lived she must have climbed a fence & in climbing it her petticoat (which was of a singular kind) caught in the rail & tore a piece out of it, which piece was found & on comparing it, it appeared exactly to fit the rent in the petticoat. Now from all these circumstances who would not say that she was guilty? Yet some one else might have put on her shoes, petticoat &c. yet this is not probable. These circumstances were sufficient upon which to ground a conviction the presumptive evidence was conclusive to the mind.

This presumptive proof may also in many instances be drawn from writings. As e.g. J. T. in a letter a Libse of Black acc to A reserving 100 lbs for another.

Evidence.

J. T. signs it but it does not. - It does not pay the money when due & J. T. sues him. he replies where is my promise to pay. How can it be compelled to pay? The writing itself proves no promise to pay, but it accepts the lease, & there is therefore an implied agreement that he will pay the money. J. T. says but Mr. A. did you not enter on the land & keep possession? - Yes says A. but for all that I might have been a trespasser. Well says J. T. did you not enter on this land 3 years ago, & the two first years pay me the rent? This being the fact, I can say no more. All these circumstances prove that he agreed to pay though the writing does not say so. there is no proof of a direct promise, it is all presumption.

The case of the bloody sword is a very common example given under the head of presumptive evidence, as where in a case of murder a man was met coming out of the house with a bloody sword. Now who would doubt under such circumstances that he was the murderer. yet even these circumstances are not in every instance sufficient to prove the fact, as they have once failed. Such circumstances as the above is usually sufficient, upon which to ground a conviction. But I say it has once failed. There is a case ^{where} in ^{the} town of ⁱⁿ the city of a person was convicted & executed on this presumptive evidence. The circumstances were strong against him. He & the man whom he was convicted of murdering, had had repeated quarrels, & the man & parents,

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had often threatened the man murder. In a way of some
do several persons ran in from the Street & met this
man with a bloody pignard, as his hand coming
out & this together with the threats he made use of
before, being proved, he was convicted & executed. About
25 Years after the person who actually committed the
murder confessed it. The facts were then the man
who was murdered was a miserly old fellow &
lived in a house alone. The fellow who murdered
him, entered through a back door & intended to have
stabbed him at once in the heart so that he would
not groan & he could then take his money. But the
man on being stabbed groaned & at that moment
the man (who was afterwards executed the innocent)
entered the house & the ruffian escaped. This the
back door - he drew the pignard from his breast,
by the groans of the murdered other witnesses in the
house & him dying & this man with the pignard
in his hand. Now from all these circumstances he
was convicted. The jury could not have done other
wise in such case & yet they were mistaken. The
man was innocent. We ought then in such cases to
be very extremely careful.

There are a number of very important rules
relating to this subject, which may as easily be un-
derstood. I shall give them to you as I proceed.

In the first place it is a rule in all trials
that the best evidence must be introduced which
the nature of the case will admit of. You are now

Evidence.

to understand by this, that the highest evidence in the grade of evidence must be introduced. No, it means only the highest evidence which the nature of the case admits of. We all know that written evidence is a better kind than parole. But if there is no written evidence, parole is admitted, as being the best which the nature of the case admits of. But you will observe that if the agreement is written, you cannot introduce parole testimony to prove it, because it is not the best evidence the nature of the case will admit of.

Again suppose a contract is reduced to writing, & A. and B. are the witnesses to it - and it is denied that J. S. signed it, i.e. it is denied to be his act and deed, and C. is brought up to prove that J. S. signed it. Why introduce C.? on the other hand you may ask why is he not a competent witness? Why he would be, were it not that the evidence of C. is not the best which the nature of the case admits of. Why do you not introduce A. & B.? They must be produced if possible. But suppose A. is dead & B. out of the country - why then C. may be admitted. When C. being admitted says 'I to be sure was in the room at the time these persons were making the contract, but as it did not concern me I paid no attention to it. I never saw J. S. sign it.' Well in such case still lower testimony may be produced & admitted. You may call in D. to prove the writing. He swears that he is well acquainted with

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the hand writing of J. T. & that this is his. You then prove it by the best evidence which the nature of the case will admit of - but you cannot introduce this lower testimony as long as any higher is to be had.

There are cases where parol testimony cannot be admitted at all, being forbidden by Law. As in case of a Deed or Record you cannot prove it by parol - you must produce the original, except in certain cases, which I shall mention hereafter, where authentic copies are admitted. All contracts not forbidden by Law to be proved by, parol may be proved by parol, when there is no writing which can be produced.

I shall next mention what characters are excluded from being witnesses at all - 1st reason of Exclusion is Interest - 2^d Infamy I mean infamy in a technical sense - not meaning a man's bad character in Society, but conviction of a crime, &c. as I shall explain hereafter. 3^d Professed Atheism 4th Want of discretion. These are the four great causes - there are insolated cases which I shall notice hereafter which do not come under any of these heads.

1st Interest. what does it mean? The interest must not be an interest of feeling &c. It must be a pecuniary interest, & here we have nothing to do with the Perjury. Some will not swear falsely at all on any account, others will not for a trifle. You cannot draw a line.

Evidence...

There can be no line drawn between the value of one Cent & one million of Dollars, as respects the interest. Nor can we draw a line as respects characters altho there is great difference even in this. No relationship excludes except in one insolate case. (I will mention that by the bye -) A Father may swear for a Son a Brother for a Brother &c. - yet I believe that persons w^d be sooner biased by relationships than by money. The relationship may may be proved to go to the credibility, but not to the competency of the witness. However small the pecuniary interest is it excludes, but however great the interest in expectancy may be it does not exclude. There must be to exclude a real interest & one which is certain. As e.g. if by the party's losing his action the witness will thereby lose one dollar, this will exclude him, but on the other hand, if a man be in his 80th year & has but one Son, & there is an action of Ejectment depending about a tract of Land wh^{ch} y^e old man says is his - here the Son may be admitted as a witness on y^e trial, tho he perhaps expects to be, perhaps is of that land the instant the Father dies, wh^{ch} may be in one month. here is an interest in expectancy it is not certain for he may be cut off. he is therefore a competent witness. Again it is an interest in the event which excludes not an interest in the Question. - There are two kinds of interest in

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the event either of which will exclude, one is direct & the other a consequential.

A direct interest is..

If the verdict & Judge can ever afterwards be made use of to subject the witness to the payment of money, as being the ground for an action in evidence or &c. it is a consequential interest in the event, which will exclude his testifying. As suppose the body of J. D. is arrested. S. W. gives his bail bond for him, then the Judge describes the nature & effect of a bail bond. When they come to Ct. J. D. sets up a defence, & on the trial wishes S. W. to be sworn as a witness. he is objected to & is excluded - for if the Judge is J. D. & he is not surrendered up to the officer in satisfaction of the Execution, S. W. will be liable on his bond. The bond was given not for payment of the money on the first instance, but for the payment of it provided J. D. was not forth coming at the time. So that if S. W. does not see that his body is so surrendered up, he will be liable to pay the debt on which J. D. was sued.

So in any case where the present judgment can be produced as evidence to subject the witness in a subsequent action, it is a consequential interest. It is the interest in these cases, for the witness so to swear as to clear the principals, & thereby discharge themselves from liability. They are therefore excluded. But,

Interest in the Decision does not exclude. There are a variety of cases in the Books exemplifying an

Evidence.

interest in the Question. As e.g. the witness may have a suit depending on the same point will this exclude him? No. It is not a direct nor consequential interest. the judgment cannot affect the witness - he may think that if this case goes so it will settle the point, & this must afterwards be determined the same way - As for example say J. S. lent T. R. 1000^l at 10 per cent. interest, & also lent J. W. the same sum at the same rate of interest - T. R. sues T. R. on his obligation, & he knowing it unlawful defends, & introduces J. W. as a witness. Has J. W. a direct interest in the event of this suit? No. for let the judge go for T. R. & it can never affect him at all. Well, is he consequentially interested? No, for he can never use the judgment in this case in his favor in any subsequent action, neither can any one make use of it vs. him. There is then no interest. This feeling it is true may be raised. J. W. may know of the usury in T. R.'s contract, but T. R. may know nothing of his. An interest in the Question then cannot exclude a witness.

Again - Suppose T. R. beats J. S. in the street, & the peace is broken. A Grand Juror carries T. R. before a Justice & J. S. is there brought forward as a witness. He will be admitted, for the judge by the, if in favor of the public cannot be made use of by J. S. in the suit he may bring for his personal injury. It cannot be given in evidence in the subsequent civil suit. If T. R. is acquitted in the public suit, it will not

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prevent J. I. from recovering vs him - or if Stokes is convicted on the public prosecution it will not prevent him from defending vs J. I.'s suit. Stokes has therefore no interest at all.

This subject as to interest in the Question was formerly unsettled, & much litigated. But since 3 St. R. it is settled that a person cannot be excluded, who has only an interest in the Question, such persons being only excluded as have an interest in the issue either direct or consequential. Many & perhaps all of the States in the Union have adopted this rule. Some continued the old rule until 5 or 6 years, when a decision was had in y. national Ct. which settled the doctrine.

Under this head is ranked one case, which I conceive is an isolated one. There is but one. I remarked that no relationship w. excludes a testimony from testifying, & that is this. a Husband or wife cannot be introduced as witnesses either for or against each other. I conceive this rule is not established on the ground of interest but on a different one. If the Husband sues for 10,000 L., the wife cannot be said to have a pecuniary interest & therefore excluded from testifying. Her feelings might to be sure be raised, as a recovery by the Husband might conduce to her comfort. The principle is apparent, that she is not excluded on account of pecuniary interest, for in all other cases, a person, the interests, may be admitted to testify if the opposite party will agree to it. This is frequently done - It is a principle of the Common Law.

Evidence.

But a wife cannot be thus made it the opposite, nor by will, consent to it. The Ct. will never suffer her to say one word as a witness. It is not I say in the ground, it is true that she is excluded it is to preserve domestic tranquility her husband might suppose that in the manner in which she would relate her story it would operate in his favor, when contrary to his expectations, when she tells an honest woman relates it before the Ct. it militates against him. This then is a good use. Some look & perhaps something much more - against wh. Cts. are very careful to guard.

To this rule there are some exceptions, for a man may swear the peace wth his wife when he considers his life in danger from her. ^{or} assistance ~~from~~ ^{of} her. The latter, i.e. the wife swearing the peace wth the husband is most common. In such case the law considers them no longer as one & the same, but as two & distinct persons. No one controverts this exception.

There is another exception, viz. when there is a public prosecution by an officer of the Government for a private abuse of the wife by the husband. Not a public abuse as if committed in the streets but a private one. In such case the wife is admitted a witness & says Judge Rice I can tell what a woman in almost every case will swear to when she comes into Ct. Her story will be like this. "He choked me & kicked me out of bed, & when some one passed came to the house was very kind & polite to me & called me his dear." This Exception has been denied by some.

Evidence.

Lord's case (Hutton 116) has often been denied to be Law by Elementary writers, & indeed there are some oblique opinions of Judges which show it is not Law. But there are no cases decided which will warrant these oblique opinions & remarks. That was a very atrocious case, & on that account say they the Judges sent the case to that particular case. But it is not so. The Law is well settled. You may see *Aggath's case* in *Hearge* where he says the decision in *Sir. Ordley's case* was correct, & the Law was well established, & he also remarks that *Hearge* is a correct reporter. You may see also *12 Int. 146 & 147* where the Law is laid down as settled, & there is no authority to contradict it. If we look into the consequences attending the rule, we may see difficulties on both sides; a man may be subject to the unceasing machinations & malvolence of a very bad woman, & on the other hand could not the wife be admitted to testify in such case, she would be obliged to bear with all the injuries & cruelties a wicked & unnatural husband might be disposed to inflict upon her, privately. But when these things are open to inspection, the danger to be dreaded on the part of the husband, is removed. An amiable woman would not be guilty of perjury, & the character of a bad wife is generally so known, that her testimony will not be believed.

It is said, there is another exception, viz. that if a man commits *Treason*, his wife may be admitted as a witness & I have never found a case that warrants

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()
evidence.

such a rule. The reason given in support of it is, that the tranquility & safety of the State is paramount to the causes which in other cases, excludes him testimony. Lord Russell's case in State Trials on Car 2^d. is relied on in support of the rule, but in this case Lady Russell was not called to testify to the treason of her Lord. The doctrine is contradicted in Brown v. 417.

There is a relationship between Client & Attorney which stands on a distinct principle. An Atty can not be admitted to testify to any fact or facts which have been entrusted to him by the Client. As to those facts of which he was acquainted before his retention as Atty, he may be compelled to testify. The meaning of the rule is, that he never can be admitted to testify to those facts entrusted him by the Client; of the existence of which he was ignorant until disclosed to him by the Client. It rather can be ever, after the termination of the present suit, be admitted to testify to them. it is forever closed doors to him... & this is necessary - it is on a motive of policy that 4th Law has prevented it, for if the Law was otherwise, who w^d. be willing to entrust a Lawyer, with his secrets?

Again there is this case. A. entrusts a secret to B. (who is his bosom friend) in confidence. the knowledge of which secret if known w^d. convict A. of a crime. Now say the Judge it is morally wrong for B. ever to communicate this secret to any person, & as wrong for C. to admit him to disclose it, if he will. A could never have been compelled to

Confidence.

disclose or rather confess it. B. as a friend is entrusted with it, & as long as he keeps the trust faithfully, the secret ought to be considered as known to A alone. I am conscious that A. in fact never parted with it. If the friend has been volun-^{teer}ary in giving away to the secret, or entrusted it to others, he ought then, in consequence, to be compelled to testify to the confession of A. But even this is the case, so as long as he keeps it, he should not on principle, be entitled to be compelled to come into it, & disclose it. But the decisions in Eng. & in Conn. are directly contrary. The rule is that if the person communicates it to any person, other than an attorney, the person thus intrusted with it, may be compelled to disclose the same in a Ct. of Justice. I have known the principles carried so far, that the Ct. have summoned one party to summon an intimate friend of the other party & compel him to tell on his oath the confessions, which had been made to him, when no other circumstances than that of being an intimate friend to the party concerned, & to believe he knew any thing of the matter. I have always doubted the principle & resisted it, as long as possible, but it is now settled against me. It is easy to see how the tranquility of a family, may be destroyed by such a rule. I do not know whether the English Law on this subject has been adopted in all the States in the Union, or not. In some I know it has.

(Evidence.)

Wells 2nd Feb. 23rd 1810.

I shall go on in that order with some particular
observations. On treating of the exclusion of witnesses
on account of interest. It explained the nature of that in-
terest. From that it follows that on any any case the
"peff. & def." cannot be understood that remove the prin-
ciple of interest both deposition & oaths. It is no unusual
thing for persons about commencing an action to sue
to make others too defend: in order to exclude them from
testifying. Now you perceive that this is wrong, and
there must be a remedy for it. E.g. St. Paul & St. John
vs. Hume & Walling. As was said at the time. But
a good witness for St. P. & St. J. saw perhaps that
St. P. & St. J. in self defence. You had knowning the
facts. A in the suit, with oaths for the purpose of
excluding him from testifying. Now the rule stands
this if no action can be brought that the Court will di-
rect his name to be stricken out of the suit. After
it stands evidence vs. A. which is not sufficient in
the opinion of the Court to convict him, they do not di-
rect his name to be stricken out of the suit. But
now to be tried first, & if he is found not guilty he is
admitted a witness. (See a note as to this page.) This is the
way the justice of the case is to be preserved. Now the
other hand to be wrong the principle of interest from
the peff. & he is a competent witness, as if he is a non-
int. peff. a naked trustee. Some property is given to A
to hold for B. Thus no real interest. If this property
is conveyed A must own it having no interest, he may

Witness.

be admitted to testify. He may be liable for a mere mistake, but for this he is to be indemnified out of the Property. So that only in one the principle of interest, & the person will be a competent witness. There are certain exceptions to this rule, which will be noticed hereafter.

4th. Infamy. The second class of persons who are excluded from testifying are those who are infamous. By this is not meant that every person who bears a bad character in any manner is excluded; he must be excluded if he has been convicted of a certain class of crimes. Among characters being bad, merely will not exclude him - his credibility is open to objection, & if it depends upon his testimony alone, he will not generally be believed; if his testimony agrees with other circumstances he will be believed. But to exclude him, he must have been actually convicted of such crime. Of what crime? Perjury the crime of false as it is called. This is a non or collection. It is any offence which utterly destroys all his character for integrity. This is the meaning of the crime of false. The crime of Drunkenness or Follishness is not among the class. You may be a competent witness when sober. The crime of Drunkenness does not extinguish all the witness's character for integrity. But let him be convicted of stealing, or of cheating, or of Forgery, or of Perjury, & it extinguishes all his character for integrity. You will now see what is meant by the crime of false. There are many offences which tend to lessen a person's credibility, & general character

(Evidence.)

among men, & yet does not destroy all his character for integrity, as a quarrelsome bullying fellow &c.

Now strength is not among the crimes false. Is there any? Well, even if this kind seldom occurs, for if you suspect a man of murder, he is generally honest, and thus prevented from testifying. But I think it does not come under the crimen falsi. Nor does a person he must be convicted, & you cannot exclude him until the conviction is proved, so that you must prove the record of his conviction. As to other offences as a general rule no inquiry is made about them, not even to prove his character. Except it be to prove that he is reputed to be a man unworthy of being given evidence to giving is as to his general character. So now for cases the witness's character must be introduced into proof; this does not go to exclude him from testifying, but goes to his credibility. e.g. persons who are female who keep bad houses. They are supposed to be destitute of integrity, that they may be led to swear to any thing. Such persons are not excluded from being witnesses, but the proof is introduced to impeach their integrity. This is not, from any crime &c. specially, but merely that they keep bad houses. There is one case where a man is excluded from being a witness, under the idea of his being the crimen falsi, tho' you w^d not think it was so. It is the crimen falsi, or an exception to the rule. I mean the crime of Perjury. If a man is convicted of this crime can he no more be a witness at all, than if he had

Evidence.

providing that no one would swear or confess a thing to his self contrary to the truth. So what a man says in articulate words is allowed to be sworn to (that is saying). But the person must have supposed himself dying at the time he spoke the words. This hearsay evidence is allowed under the idea, that he is under as great an obligation to speak the truth, while in that situation, as he possibly could be under in a court.

And in extension of the principle, that professed atheism excludes it: there have been several legal decisions in Eng. where witnesses have been excluded because they did not believe in a future state, of rewards & punishments. At U.S. Inferior Courts, Mahometans, Pagans &c were excluded from being witnesses. but they may now be admitted, if they take an oath by their own gods. The oath must be according to their belief & usage. as a Mahometan must be sworn by the Quran &c. The reason why these persons were formerly excluded was that the oath was administered, & the witness sworn by the Holy Evangelists, and the rule then was that unless the oath was thus taken the person could not be admitted to testify, therefore a Pagan or Mahometan could not be admitted, for they had no belief in the Holy Evangelists. But the rule is now altered in England. It happened that in the first settlement of New England a man was appointed for a minister, which has now by a course of decisions been accepted in Eng. viz. Not swearing by the Holy Evangelists but by an apostle's hand. & of course all who believe in a god, are admitted to testify.

CRIMINALS.

IV. Want of Discretion. The affidavits of
men are immaterial, & so are those of
children, they must inquire into it. Minors are
certainly not to be witnesses. It depends however
on their having discretion & knowledge sufficient
to know the nature of an oath. The rule of S. C.,
that after 12 years of age there is no inquiry into
their discretion, except they be fools, & so it is
that they are treated like any other parties. S. C.
at 12 persons of either sex may be admitted as wit-
nesses without further inquiry. This I believe to be
the better opinion, tho some say not until 14. It
is presumed that at 12 they know the nature & mean-
ing of an oath. Under that age, the Ct. must inquire
if the Child knows the meaning & understands the
nature of an oath. he may be admitted to testify.
I have frequently known them admitted at the age of
7, 8, & 9. and there have been extraordinary instances
of their being admitted at 5 years of age. I never was
present in a case of this kind, but it has been done. They
are excluded merely on the ground of ^{want of} discretion, & this
is to be enquired into by the Ct. when under 12 years of age.

These are the 4 great causes for exclusion
of witnesses. I have further to observe that testimo-
ny may be rejected, because it is improper to be
given - not because the witness is not a proper person
if the testimony is to be admitted. On this ground stand
all irrelevant testimony - it does not tend to
prove the issue. As when the issue is whether a

Evidence.

Tom is usurious or not & A. is introduced as a witness to prove it. Now if he cannot prove this, but can prove extortion or mistake, his testimony is irrelevant, & the Court must exclude him. So in any case where the evidence does not conduce to prove the point in issue it is rejected. As this ground it is that hearsay evidence is not admissible. Now thus do you, as is frequent in the case, admit witnesses to prove what another man said out of Court? I will explain it by an example. Suppose A comes into Ct. & swears thus & thus. Now you may call in witnesses to swear that they had several times heard A tell the story quite the contrary - the objection to this is, that having got it out of Court, he was not under oath. but you will observe this hearsay evidence is admissible not to prove the fact about which A testified, but to impeach his testimony - he related the story different ways - he contradicts himself. it does not now conduce to prove the fact, nor can the jury go either way from this testimony. They cannot say whether A. told the truth when he was relating the story to Tom Dick & Harry, or whether he now tells the truth on Ct. You may always introduce evidence in this way to impeach another's testimony. There is one set of cases where nothing else is admissible or introduced but hearsay. It is where you impeach a man's integrity for truth. Now cannot prove him guilty of this or that crime for as this he is not prepared to defend himself. But

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But, you may, from his general character. It is not what you know of him. It is his genl. character among men & that depends on his own will & the. Have you seen this a more at description of law evidence & testimony. Have some observations to make on it.

Written Evidence or Testimony. This is distributed into 3 kinds - 1st Records. 2^d Any instrument in writing under seal, called Specialties. 3^d Any other writing not sealed. We must keep up this distinction because this as to each is different.

1st Records. By this is meant the acts of legislative Bodies, and the judgments of Courts. Other things are called records, but they are not so, nor known as such in the law of evidence. as you hear it said the "record of a deed" - "of a marriage" - "of a birth" - or of a death". These are things recorded, but are not records in contemplation of Law.

Records prove themselves. there is no need of witnesses - indeed they cannot be proved by any thing but the record itself - which is by inspection. The record is evidence to the Court & jury, & contains in it, absolute merit, till reversed or ...

A record is ordinarily proved by an authenticated copy of it, & not by producing ^{records} ~~it~~ itself. The reason of this is obvious. Records are deposited in a certain place, where all persons may examine them, & it at occasion much trouble & expense, if they might be removed from place to place.

Credence.

For this reason, the rule requiring the best evidence to be introduced, which the nature of the case will admit of, is ~~on~~ here dispensed with. Copies rather than originals as the laws directly are evidence. The principle is founded in necessity. There are States in some States requiring deeds to be recorded & as a general rule where this is the case, a copy of the deed is not evidence, & for this reason - the deed is not retained or kept by the recorder, but after being recorded it is delivered back to the party.

At C.D. Copies are admitted where the originals cannot possibly be had. is where a wife who is entitled to dower says she is not bound to produce the deeds, for they are in the hands of her husband. In Court we unfortunately allow copies to be produced as evidence. I say unfortunately for it leads to bad consequences - as suppose A. forges a Deed he may get it recorded - destroy the original, & when occasion requires produce a copy from the record. Now how can you prove that it is a forgery? It is said the Law has guarded against this by requiring the solemn oath of witnesses - but how easy a matter is it for him to forge the name of witnesses? He may put the names of persons to it as witnesses who are since dead. Well it is said the Law has further guarded what by requiring an acknowledgment before a Justice of the Peace but there is no more difficulty in forging this than any other part. At present our practice of admitting copies as evidence because formerly the persons had

Evidencia.

has proven the truth of this once they talk in far
this case of them. The English is the respect, it is for
the best. Then the words are heard and from genera-
tion to generation, it all remains the title of the same
is settled by a recurrence to the same.

Notion: - that things were proved by inq-
ues. is that they prove themselves. But with respect
to other things they may be proved by other testimony
as if the fact is concerning the birth of a child that it
is not proved. yet it may be proved by saying the
smelling to record the birth is only a law to say. So
the birth may be otherwise proved. If by the record
the birth of the child was proven so that without
it the child could not have been born. The child
could not be the only admissible evidence - but the
Law making it necessary to record the births of chil-
dren is only a regulation for other purposes. But
records can be only proved by themselves, unless they
are burnt, destroyed, or taken away so that they can
not be had.

But Ist note Specialties you may intro-
duce much more than. yet you cannot prove any
thing by Record which will cause the destruction of the
writing, or perjure it, or give it a different meaning.
I am sensible no proof is admitted to explain
it - you recollect there are certain solemnities re-
quisite to a good deed - now you may prove the ex-
ecution of it in proof - not by introducing those persons
who signed it as witnesses - or if they are dead & out,

Evidence.

of the Government you may by parole prove their kind writing. Again it is an independent requisite to be done, that it be a deed now you may prove that by parole, but you cannot introduce parole proof to explain the meaning of each condition to the deed.

With respect to the consideration of a deed, you cannot prove by parole that there was none you may for certain purposes enquire into the quantum of it. The parties cannot enquire into the consideration for the purpose of destroying the validity of the deed but third persons who are interested may at all times enquire into the consideration. Suppose no consideration is expressed in the deed, now it makes no difference as to the validity of it, being as there is a deed, which in law imports a consideration. I mentioned that for certain purposes the parties might enquire into the quantum of the consideration - but this cannot be done where it will destroy the validity of the instrument. They may thus enquire in cases which bind in damages - as if a man enters into a contract with certain conditions & performs some and does damages - there was nothing but a nominal consideration now this cannot be an enquiry into it to get the right of recovery, but there may be as to the damages - the damages will be nominal & paid according to the actual loss sustained. Will

Evidence.

Sect. 3^d Feb 24th 1813.

I have now concluded my prefatory remarks, & shall proceed to give you the principles with authorities.

I have remarked that it was a general rule, that the best evidence the nature of the case will admit of, must be produced.

Another general rule is, That no person who summons another as a witness has a right to impeach him - however contrary to his regulations the testimony of the witness may be. The rule is established on the ground that the Law will not permit a person to summon another as a witness for the purpose of impeaching his character & thus gratifying his malivolence. The rule however requires qualification. You are not to understand that the party is precluded from introducing other witnesses to prove the existence of certain facts, inconsistent with those sworn to by the witness, & therefore render his testimony of no avail. This he may do - it is not impeaching the character of the witness, for he may have been mistaken. The meaning of the rule is, that he is not at liberty to question the character of the witness as to truth, tho he may introduce other witnesses to prove his truth or falseness. Suppose E & G in a small gallery, A. is indicted & calls in T. M. to testify and he T. M. continues to the expectation of A. & G. sworn to facts which are inconsistent with him. Now A. & G. can not introduce witnesses to prove that T. M. is not to be believed. neither can he

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now that the witness has before told the story differently - but he may introduce witnesses to prove facts which will show he is not guilty.

I observed to you that evidence was divided into three kinds. Oral Testimony which is either viva voce or by Depositions. Written Testimony which includes all writings, and Presumptive Evidence, which is either from written or oral testimony. I sufficiently explained the nature of these kinds. Presumptive evidence is inferred from the principal fact proved at trial and is lighter or stronger according to the circumstances. For when it amounts to violent presumption it is strong, and the circumstances together conduce to a belief. I also mentioned the causes for excluding persons from testifying. The first was Interest of which I repeated. I mentioned also the relationship between an Attorney and his Client, which excluded him from testifying, about what was communicated to him by his Client. I also observed that there has been a great difference of opinion as to this point - whether when a person makes a confidential communication to a friend, the friend can be compelled to disclose it. I observed that although it was usually so, yet a disclosure of it - the friend was not otherwise. The second ground of exclusion was Infamy (I had to explain at trial) the third was professed ill-will (I had to explain at trial) the fourth was want of discretion (I had to explain at trial). I also mentioned the exceptions in case of a wife testifying &c. I also stated to you the general rules, and with intent to

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to avoid it. I mentioned that persons were frequently made doctors, to exclude them from testifying. here he repeats the remedy, as at ante p. 14, it is not to be used, but as interest, he says, to a witness, as in case of a trustee. You may see the manner the law proceeds in each case in 2 U.S. 237. it is then seen the law does so.

The law has been, when it was law, whether he is a witness in a crime could be witnesses. but this has long since been settled, an accomplice may be admitted as a witness for the state. but the credibility of his testimony is open for objection. such persons is sometimes entitled to but little credit and sometimes his testimony is entitled to full evidence, as if it is connected with other circumstances which are known to exist. He has a received opinion that if an accomplice turn state evidence he cannot be prosecuted. it is so in effect. then there is no contract made with him that he shall not be prosecuted. therefore if he is prosecuted there is no breach of contract. but still it is considered that the honor of Government is pledged that he shall not be prosecuted. 2 Hawk. 482.

Of Persons interested & the Exceptions from the rule.

The interest to exclude a witness must as I remarked before, be a pecuniary one. There is no inquiry as to the Quantum. be the interest ever so small, the witness will not be admitted. There is a necessity that the rule should be general. Some would say for diseases others would not for the Universe, and therefore it is proper that pecuniary interest should always exclude. 102

Evidence.

we will see, however good this rule may be, that the danger of bias arising from relationships is in many instances much greater than that arising from pecuniary motives. The relationship between the witness & the party may be required into, & the jury will attach much weight to the testimony as in their opinion is due.

It was always the rule, that an interest in the event excluded. But it was not always the rule that an interest in the Question did not exclude. It is now well settled that it must be an interest in the event which will exclude. I have explained what an interest in the event was. that it was of two kinds, direct & consequential. If the person who is put forward as a witness, will be either a gainer or loser in the event of the present suit his interest is direct and will exclude him. or if the witness has furnished money to carry on the suit. if so he has a direct interest in the result. It is no matter what the position is if it is a direct interest he will be excluded. So also a consequential interest excludes. If the judgment in the present suit will lay the foundation for a subsequent one vs the witness or make him liable it is a consequential interest which will exclude. e.g. A having given bond for B. cannot be admitted to testify - for if the judgment goes vs B. it may become liable on the bond? his interest is consequential.

An interest in the Question will not exclude. What is this interest? Why is it that it is no interest at all. It is a strong feeling or bias on the mind of the

Evidence.

Witnesses owing to his having a case depending upon him
can witness e.g. A. insured a ship for £1000 to go
from A. to B. & from B. to C. & D. insured another ship on
the same condition for the same voyage & A. & D. caused it
and his defence is that A. & D. were guilty of a fraud for
that immediately before he came to get the ship insured
in the A. & D. had heard of her being a distressed vessel and
hands were at the pump & so and this fact he (A. & D.) do
not make known to A. & D. as he was bound to do. To
prove this A. & D. introduce A. & D. as a witness he will
be admitted for his interest is neither direct nor con-
sequential. the judgment in this case cannot be in-
troduced in any action between A. & D. or A. & C. A. & D.
has only an interest in the Qu. and is a competent
witness. All the danger of admitting persons interested
in the Qu. to testify is that there may be a combina-
tion among men. the Qu. however will not presume
this. the effect of such combination to destroy the
testimony of such witness will be wholly destroyed.

So it is an interest in the Qu. when there
is this strong bias on the mind. as in the case of Paul &
& Bullock. I have before mentioned, where the party in-
terested is admitted to testify in the Public Prosecution.
His interest is neither direct nor consequential.
it is an interest in the Qu. merely. It has sometimes
been perplexing to draw a line between this conse-
quential interest & an interest in the Qu. but if
the rules are strictly attended to, there will be but
little difficulty. on the one hand if the witness

Evidence.

may possibly be made liable, tho it is not certain that he will be, his interest is consequential - on the other hand if he has only a strong bias, - cannot be affected either way by the other in the course of the suit - it is only an interest in the Question.

If the party a man is prosecuted for Usury the party to the contract may be admitted as a witness in the public prosecution. Again A. & B. have some petty bought packages of Goods from C. D. claims the goods to be his & says they never belonged to C. The Sues A. needs B. may be admitted a witness on the trial he has only an interest in the Ques. This judgment in the present cause, cannot be introduced in any action between D. & B. A may have a verdict in his favor & yet B. may loose his case - they have no connection with each other - On the trial of the suit. vs. A. B. may completely establish the fact that the goods were the property of C. and that D. had no right to them. Now when D. Sues B. he may be unable to prove the fact which he has proved for A. and the cause will go vs him - A may know nothing respecting B's contract, tho B. may be well acquainted with A. He has then only an interest in the Question.

The mode of ascertaining whether a witness is interested or not are Two. In any case you may introduce testimony to prove that the witness is interested or leaving this alone you may challenge his testimony & put him on his voir dire i.e. he is called himself to testify whether he is interested or not. This last contains

Evidence.

Contradicts the 3^d principle - i.e. that a person is not allowed to testify concerning himself. It is however an established principle that both these modes can not be adopted - if you fail to prove his interest by adopting one of the modes, you will not be admitted to adopt the other. The reason is obvious - a man will not be permitted to take this method of bringing an other to shame & indulge in his own malice. When the witness is on his oath & sworn, the party may ask him as many questions as he pleases, but the Law will not permit him afterwards to bring in witnesses to prove that he has a special regard for his self. Altho he may be culpable, & it would be no more than just that he should be left to shame. Still the witness is not here on his oath. But how it came to be established, that after introducing testimony for the purpose of proving an interest in the witness, & failing in the proof, that you were not then at liberty to put the witness on his oath I know not. The rule however is well established that you cannot adopt both modes. 17 How 458, 4 Benc 225. 12 Mac 283. 13 Benc 724.

If it turns out on the Trial, that the witness considers himself bound in honor he is excluded as much as if he were bound in Law. As suppose A makes a parol agreement to pay the debt of B. now this is not binding on him in Law, for the Stat. of Frauds & requires a writing - that a contract or agreement to pay the debt of another is not good unless it is in writing.

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writing - but if A. feels himself bound in honor to pay it, he cannot be a witness for B. - he is interested & of course excluded. 17 How 358. 4 Bur. 2259. 1 Mod 21.

The questions usually put in a voir dire are these "Are you interested in the event of this suit?" He answers "No." "Are you in any way affected by the result of this case?" Answer "No." - you then go on to enquire into the state of the case, and it may appear that he had an interest, tho he was ignorant of it previous to the inquiry - he might feel as if he had no interest at all, but he has now found out that there is a possibility of his being hereafter made liable - he will therefore be excluded.

I stated to you that an interest in the case did formerly exclude in all civil cases, and never excluded in criminal cases except in three instances viz. in Usury, Forgery, & Perjury. To the persons affected by the Usury &c. could not be a witness in the public prosecution. The rule has been altered, as I mentioned before, & the new rule has generally obtained. Had it obtained universally thro the several States in the U. S. it would be a matter merely of inquiry but it has not. Several years ago it was decided in the Southern Circuit that an interest in the case did not exclude - it was decided in the same way in the North & Eastern Circuit - but in the middle Circuit it was decided contrary to the other two decisions, and from that it went up to the National Ct. where it was decided that such an interest did not exclude.

Evidence.

So that we have now the adjudication of the Judicial Ct. which is really the same as that given in the case of *West & Baker v. Eng* in 3 T.R. & so that since that decision the English Rule stands as really the same. It was difficult to see why according to the rule it should be included in Civil and not in Criminal Cases. The line was easily drawn, but it was difficult to give a reason for it. And why it should have included in Civil in Criminal Cases & not in others seems still more difficult. I have taken much trouble to find the reason for it. I suspect in Eng? they have certain reasons well known to themselves, which we have not got at. In case of Forgery there was a good reason - for it is a rule among them, perhaps founded on some very ancient Statute, that every man who convicts another of Forgery is entitled to S¹⁰. Now then the witness has a direct interest & should be excluded. But how do you account for it in case of Forgery? Why should not a man whose name is forged to a Bond be admissible as witness to prove the Forgery? He is directly on first view an interest in the Question. I think the reason is this, & I infer it from an expression which has in one or two cases fallen from the Chancellor. it is this. on a conviction of the person from the Forgery the note or bond &c. is cancelled - and if this is the case, it decides the Q^u. & furnishes a sufficient reason. The same reason will no doubt apply in case of usury - now on the Statute to which you belong, if the rule is not so - viz that the instrument is

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is not cancelled, the person may be admitted as a wit-
ness. I see no other way for accounting for 7: Eng.
Rule than that which I have given, and if I have
found out the reason in case of Forgery. it will be
it will apply in case of Usury. Ward. 331.

It was always the rule, even before the case
of Bent & Baker 3 T.R. 1 that in Usury the person
who was affected by it might be a witness in the
public prosecution if all the money was paid, & now
this must certainly proceed on the ground that the
money could not be recovered back. We may then
take the Rule to be that an interest in the Law
does not exclude. The same rule holds in Criminal
and civil cases. The whole of this Law is appar-
ent in the case of Bent & Baker 3 T.R. 1. and altho
that is a case by itself & has settled the Law, yet that
very case is founded on the case of Abrahamson & Burr
in 4 Burr. 2251. See 2^d Mansfield's long & strong opinion
there. There is no case since that of Bent & Baker, which
varies from it. You may see a case in 1 Ventris 49, where
S^r Holt gave a hasty opinion - not Law. altho he was
perhaps as great a judge as ever sat upon 7: bench
yet he made more mistakes than almost any other,
by being always ready to decide, & sometimes too hasty.
He was however always willing to recast or finding
to be committed an error in judgment. See 2 P. Mag. 396.
6 Mod 211. The 652.

To the general rule that I have stated that a pe-
cuniary interest excludes, there are some exceptions -

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1st On the ground of necessity.—What must that necessity be? not such necessity that the party must get his case. It must be a case where the Law would be negatory if the principle was not disavowed with. as in Eng^d under the Stat. of Winton, if there is a Robbery committed, the hundred are bound if they do not apprehend the robber. But how is the man to prove that he was robbed, and the amount too? The man is entitled to recover if the robber is not apprehended he recovers of the hundred. But from the necessity of the case the person robbed is admitted as a witness in an action vs the Hundred for otherwise the Law might be wholly negatory, as it can hardly be expected that a Robbery would be committed in the presence of witnesses. If the principle is the same, I think, when a traveller stops at the house of an Innkeeper, and is robbed. Now in such cases the Law has made the Innkeeper liable, if the Traveller can prove that he was robbed & to what amount. But how is he to prove it? why he must be admitted as a witness on the whole Law on the subject would be negatory. It would be a hard thing if the traveller were compelled to have witnesses at every Inn to prove what he delivered over to the Innkeeper. It would be putting travellers in the power of Innkeepers. On the other hand it is said if you establish this rule you put Innkeepers in the power of every man who travels the road. But I say when an Innkeeper is thus charged he must produce witnesses to prove the Travellers character &c.

Evidence.

is open for inspection. and the danger to be apprehended is much greater if the rule is not established as I have laid it down, than it would be under such a rule. J. W. Gould's opinion Contra see Moore's Reports 2 volume Page 1. p. Haris 331. 2 Rep 585. 3 Moore 114. 10 Moore 193.

Under the head of necessity a question was raised, whether the Daughter who was served could be a witness in an action by her Father as the Defendant. She may be a witness. and some say it is from the necessity of the case. but it does not proceed on the ground of necessity. She is a witness like any other person. she has no interest. the suit is not by the father. and he is not she is entitled to whatever is recovered. The court not being the action, as she is party's Criminis. She has no interest, & is therefore a competent witness. Tha. 1054.

Executors, & Prochein Amys have, in some cases, been admitted witnesses in suits.

It is said it is on the ground of necessity, but it is not. In the cases where they were admitted they were mere naked trustees. had no interest. A Guardian may be liable to a bill of costs. but for this he will be indemnified out of the decedent's estate if the suit is properly conducted. But if he so conducts the suit that he is liable. will not allow him any indemnification for the costs, i. e. if he will be liable for costs he cannot be a witness. but if he is a mere naked trustee he may be admitted to testify. So a prochein Amy may be a witness, if he is indemnified for costs. Hence if he is not, Tha. 506. 1126.

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It has been said, & indeed may seem hard, that where a Statute is made & a penalty attached for the breach of it, & given to this penalty, to him who shall prosecute the offender to conviction, that the prosecutor must be admitted to testify, since the law cannot be enforced. It is not so. The principle of necessity which forms an exception to the general rule cannot be supposed to relate to these cases. The Statute says a witness may be admitted (the interest, from the necessity of the case, relates to those cases which I have mentioned, as common Robberies &c. and not to a common public information. If the prosecutor in this case fails to recover the penalty, let him fail. but the Law will not be defeated. Suppose A knows that J. T. has broken a penal Law. now if he is so patriotic that he cannot bear to see the breaker of the Law go unpunished. let him get his friend B. to prosecute, & then he, A. will be a good witness. But in such case B. must have the whole penalty. for of there is any interest on the part of the witness, (A.) it will be discovered in his voice & he will not be allowed to testify. On this ground of necessity it is that persons have been allowed to be witnesses. The allowance is by Statute, but it is a Statute made on the principles of the S. D. There is a Stat. in Conn. enacting that a man whose property has been stolen may recover treble damages. But can he be a witness to prove the theft? no. not even if he saw him steal it. but he is permitted to swear to what cannot otherwise be proved, viz. that the property stolen was his.

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Sept 4th Feb 4th 1812.

Under this head of necessity is the case of an Escaper, being a Witness to the Staff, when he is sued for a voluntary escape. The Escaper's interest is as strong, as it can be, for if judgment goes vs the Staff, the Escaper is discharged from any liability to the Creditor he has received from the Staff & he cannot be entitled to another recovery vs the Escaper. Now can the Staff sue the Escaper after being subjected to the Creditor. He is participes criminis & the law will afford him no assistance. But if judgment should not go vs the Staff, the Escaper will be liable over to the Creditor, so that it is his interest to swear vs the Staff. But still as he is not the only one who can prove the fact he is admitted as a Witness from the necessity of the case. So also in a negligent escape, where the party escaping may testify, but the rule is given in case of a voluntary escape do not take him in. In this case the Escaper is liable at all events. The Creditor may sue him - or if he does not and commit the Staff, the Staff may sue the Escaper & recover. And this remark that it is a rule when the interest in the suit is equally balanced between two contending parties, he is admitted. He has no interest in fact. But in case of a voluntary escape the Staff can never take the Escaper, & the Escaper is the only one who can prove that the Staff voluntarily permitted him to go at large. The Question is the same in this case as it is in the same ground. The recovery is sued by the Staff. How is he to prove it? Why by the party who has been

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has an interest for if he can fix it upon a rescuer he will be cleared from all liability & judgment as the rescuer clears him, for the rule is that no man is entitled to recover twice for the same thing. See *Smith v. Lusk* 100 Mass. 201. under the head of "rescue" and citations in the same in *Smith v. Lusk* 100 Mass. 201. 5 Mass. 211. 2 Mass. 348.

The officer himself is a witness in the proof of necessity, i.e. he is a witness in a certain way. He is not permitted to come into the case as a witness, but his return on the back of the writ is evidence of the rescue till, contradicted & proved to be false. It is, however, evidence. A return of an officer is in its own favor is always receivable. It is not conclusive evidence but only forms a piece of evidence for him. It stands as proof till shown to be otherwise. Under this rule may be comprehended the case of a Detective in being sworn to apprehend a felon. The man applying to the justice for the reward is (in case it is a capital felony) a witness as to the fact of a apprehending. See *16 Mass. 353*.

Another case universal in its operation which takes in a vast number of persons is that of Joint Tort-feasors. They are interested parties, but may be witnesses. Suppose 3 persons commit a wrong. One of them may sue 2 of them or one only just as he pleases. In tort it is a rule that the plaintiff may sue all or any part of them at his election. Suppose he sues A and B. and then introduces C. as a witness. It is said C. is interested. How? Why if plaintiff gets a judgment against A and B.

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and B. he never can receive it. for one judge in
in a case is conclusive and A. & B. cannot compel
C. afterwards to pay his part. This case has been
ranked under a distinct head, but it is founded in ne-
cessity. in many instances it could not be proved
otherwise than by one of the test, teachers themselves.
It was established as a rule on the ground of necessity,
but it is not now a matter of necessity in every
case, yet it is admitted in every case. And on y^e same
ground it is, that the Public take oaths, & oaths of
witnesses. the crime could not, in many cases, be other-
wise proved.

A third class originally founded in necessity
is that of agents. they may in civil actions be ad-
mitted as witnesses either for or against their principals. As
e.g. J. S. delivers money to his Agent T. & B. to be paid
to S. W. T. & B. contends that he never received it.
on the trial between J. S. and S. W. T. & B. is a witness
as to the delivery of it. to S. W. tho he is interested con-
sequentially in the event. for if it turns out that
T. & B. has received the money of J. S. and has not paid
it over according to the directions of J. S. to S. W.
tho T. & B. is liable for the amount. it is for his in-
terest then to swear himself clear. This too will ex-
plain the rule, that the best evidence which the
nature of the case will admit of must be intro-
duced. here T. & B. is the best evidence that can be had.
and this might have been prevented, if the law had
required that a Receipt should always be taken. but it

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it does not. neither does general evidence require it. If a Receipt had been given it would be necessary to produce it as evidence, not a better proof of testimony than the oath of an interested person. There is a strong case of this kind. A Father was indebted to a Son, and the Son made several payments on it. and at one time he sent £100 to his Son, when the bond was taken up. It was found that at the time the father sent this money there was only £90 due. The Father lost his claim of £10, & to recover the £340 paid by mistake. & the obligee said that he had only received £200 and that if the father had sent £100 the Son must have retained the odd £40. Now the Son was of full age, was as likely to pay back the sum if he had retained it as any other person. But he was admitted as a witness, tho' he was interested in the same matter as above viz. that he acted as agent. Chalk 289.

The case of a Factor who acts as agent is more of this kind. It was the purchase of goods. The Plaintiff & the Factor. B. sold the goods to C. & denied that he purchased for such a price - who was to prove it? The Factor. The objection was that the Factor received a Commission - that it was his interest to make the price as large as he could; because the more the goods were sold for the more he received. But in being an agent, & perhaps, perhaps, the goods of necessity, he was admitted a witness in the cause between A & B. Brevils 40. Same principle in 2 V. 30. 590

Mentors

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Members of Corporations are interested in the concerns of the Corporation in some cases they are interested as contributors in others not. This business does not appear to have been resolved to a certainty till very lately. The Courts authorities are contradictory. Some times the members were admitted as creditors in disputes about the concerns of the Corporation. Sometimes they were not. Sometimes they were held to be liable if the sum in dispute was small. At other times they had neither such members to testify as were rich and of high standing. I mention this that you may not hereafter be misled. But these distinctions are all settled and the law is now pretty well settled. The rule appears to be that in all Corporations where the members as such are not individually liable to pay in case of any loss, but the loss must fall, if at all, on contributors they are admitted as contributors. This is the case with all Charitable Corporations. If they are sued on a claim the fund only is liable - there is no individual interest; and if costs accrue they are to be paid out of the corporate fund. The members are at all times exempted from all similar cases. Peake's Cas 153.

But it is otherwise if the members are individually liable. In such case as Peake's Cas 153. they are not contributors. As if a question arises whether the members of a Corporation are liable to pay toll, if they may not be liable, the point is contested. Should it be decided that they are liable to pay they must be held to pay individually. In such case the members are

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interested and cannot be admitted to testify, with their general corporate right. It supposes a company is given to a Corporation to pay the poor rate for the town is contested, and a member of the Corporation is admitted to testify for the purpose of establishing the will? No for he is individually interested for if he can substantiate the will, he will be released from the payment of his share to support the other. It supposes according to the articles of incorporation that proportion is to be paid according to the amount of its shares, but if they find that such member is liable in his individual capacity, how a member can be a witness. Now where a Corporation is treated like a Bridge, the complaint is against us then for not building it they have no funds to build it with, but we are compelled to not incur a severe penalty, how the members cannot be witnesses. So in all the cases similar, the principle is easy to be got at, if they are individually liable to pay they are not witnesses as at 100. because if not individually liable as a corporation 351. Robt. 42. 1 Thos 174. 2. 2. 2 Thos 47.

In Court we admit members of a Corporation to testify without enquiring into their interest. This difference is founded in reason.

There is a case of this kind, depending on an Eng^l Stat. suffering from it 25. - 2. q. concerning the third Law is Case of Bickley, either the Bridge or Bridge are liable to a penalty. But I am sure you cannot recover the penalty out of both. the set of

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either of them you may. now if one is sworn the other may be a witness to prove the writing. in this manner he may shew the liability upon his own to his neighbours & shew that he has therefore clearly an interest and he is admitted. it is on the grounds of necessity. 120 illy 422. Com p 179. This rule is double in Trust 451. - and in 4 East 180 there is a subsequent case, which holds up the whole doctrine, but I am not sure of it - I do not know why the law should not be thus in this case case as well as in the other cases I have mentioned. Another set of exceptions is

§ 11. Persons sometimes become interested after the event has taken place, to whose testimony you have a right.
If that is done wanting to deprive you of the benefit of the testimony you may make them swear - as if a witness says a wager that one of the parties will get his case - now he is consequentially interested in the event. this will not do. and in any other way wantonly becomes interested he will be compelled to testify. or if he becomes liable by the act of a person wanting him as a witness, as if a man who is a witness is procured upon to become a Bail, & a Bail is not to the Plaintiff - now can this witness be admitted to testify? No - for he is interested. If Def. wishes his testimony, he can change his Bail & then he may testify, for now his interest is gone. But suppose in this case plff wants the testimony of the Bail Bail, is it admissible? No. But if the person has become interested by the act of a person in any honest way,

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he is not competent to be a witness, and if A. were an
able witness to testify, in the party does & leaves him
to relate this with relation to him. he has now become
interested in the suit of 1844. See 4th. Sec. 287.

I mentioned to you that where a person adds
another as Co. Def. with the real Def. to exclude him
from testifying the rule was for the Pl. if no test-
imony is admitted vs him to show his name to be struck
out of it. and if slight testimony is admitted
vs him but which the Pl. think is not sufficient to
convict him they order him to be tried first. Rule
287. - you may also see 1st. S. C. 134. I forgot
to mention to you that this rule is quoted by Lord
Kenyon in 3. Rep. N. P. Cas. 25. The danger if any testimony
is admitted vs him the Pl. cannot direct him to be tried
first but that all must be tried together. The cer-
tainly is mistaken.

If a persons interest is so small that it is
said that he cannot be a party to the suit by the
event of the suit he is a witness. E. g. A. owes B. mo-
ney. B. sues A. money for it. A. offers C. as a witness to
prove that he (C.) was an agent to B. and states that
C. will swear that he (C.) received the money for B.
What is the objection? How is C. interested? Why if he
had the money he is as much interested one way as
the other - for if it appears that B. never received the
money and he recovers in this action vs A. then A.
may maintain an action vs him (C.) to recover back
the money - and if A. the Def. recovers in this action

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4. The C. J. may sue C. for the same sum so that he will be liable either way. And if he (C.) never received the money he cannot be made liable either way. So that even if which way you will be his no interest. is a competent witness. 4 M. 430. 70. 66. 481

The Inhabitants of a County are admitted as witnesses, when indicted for not building a bridge. They are not a Corporation, but the principle is the same. The reasoning of the R. however is singular. They say they consider the inhabitants as indifferent. that they would be as liable to swear as it for the purpose of having a good bridge, as to swear the other way, by which they would clear themselves from paying the money. 106. S. C. 129.

Another case where at C. J. independent of any Statute provision, persons interested in a party are admitted to testify. it is in an action of Account. there are long accounts between the parties very complicated perhaps and it is often impossible for any other but the parties to explain them. if the rule were not as it is, there would be a failure of justice. He is admitted to swear to his account.

There are other cases where the principle of the C. J. have been enforced by Stat. This will depend upon the Statutes in the several States. By a Stat. in some States a party in an action of Book Debt is admitted to testify. but this does not differ much from C. J. For at C. J. the Deft. is admitted as evidence & proof of the entry in the Clerk is sufficient. By

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By another Stat. in Court, in case of a secret influence & battery the party beaten is admitted to testify. The Court not to admit a witness if any person was present at the time for then it would not be a secret assault & battery. I know a case of this kind. a man was determined to beat another, & had taken two men who favored his designs, and secreted them in the bushes near a Bridge where he expected to meet the man he accordingly met him on the bridge & gave him a hard beating. The person beat went before a Justice & swore to a secret assault & battery, and the person who did the beating, joined by those in the bushes that they were present. But the Story came out that this was but a mere pretence to evade the Stat. and they were treated as if they were not true then, & the person himself permitted to swear to the assault & battery.

Courts of Equity recognize the same rule as to the competency of witnesses, which Courts of Law do with that exception that they can appeal to the consciences of the parties. If he will not answer they can compel him - i.e. they will take the petition as confessed. If the petitioner was proven his case in any other way, he has no right to appeal to the Conscience of the Court. But when he may & does appeal to the Conscience the evidence of his antagonist is not confined upon him - he may afterwards prove his facts by other testimony, & impeach the respondent's evidence. In Court of Law, as to one rule, you cannot impeach his

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his last men, the conviction him as all things but
in light as is not a conviction, would he refuse to answer
he is not he is not in a contempt as to want to if he
was convinced as a witness. The solution is not clear
the privilege of testifying. The man appears to the
presence of the respondent and then with respect to
a witness he may appear to the conviction of the
thorow to know in the respondent has not spoken
the truth - this was to establish it

There are some cases where a Stat. makes
a man a Witness, and in such cases he is a witness
either for or ^{as} himself - the other party may call
on him to swear - or if he does not come upon him,
he may come on himself - as e.g. a Garnishee - he is
a Stat. C. witness - the party may call upon him,
to testify but whether he does or not, the jury is to
may come in & claim his privilege of testifying.

In a case of Force a man is never compelled to be a witness, as his interest at a S. Court, & some States, has enacted that he may be compelled to come in as a witness (tho' Garrison's supra the party may compel him to come & testify) he cannot be forced to testify as his interest. So in case of Slavery. The party interested is a witness, no one but the other can swear to the truth of the litig. it is on a principle of reciprocity, & the principle given by Stat. 10. We have a Slave, & this kind of Slave. It is called the right Slave, much Reprobation, it allows a man to be sub-ject to slavery that some person has been him in any

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In the night, to call him up before a Court to say, whether or he is guilty or not. This Court, has been much disappointed, but I cannot see why. He is said to know the words of the Stat. are that the person must prove himself innocent, but in construction it is not so. It is almost too difficult for a man, charged with having done an injury & charged in the night, to prove himself innocent - for 10 chances to one if he could prove where he was on that particular night, & with whom he slept. So that the Stat. requires the action to be commenced immediately, that the party may prove an alibi &c. Laws of a similar kind are to be found in most of your Statute Books.

Generally speaking, where property has gone this a number of hands, none of them can be admitted as a witness, except when their interest can be released as to releasing an interest I shall explain it here after. As suppose A sells a Horse to B. and B. sells him to C. and C. to D. and D. to E. now if A claims the Horse of E. & may by releasing D. introduce him as a witness, from that A owned the Horse. So you may bring a man into C. as a witness even tho' his will, if you release him. The only objection is interest and when this is removed he is a competent witness. To be sure, it is very likely that releases of this kind are frequently given immediately before a trial, & delivered up as soon as it is over, but the Ct. cannot know this. You then see the principle - And for the same reason a person who has taken the benefit of the Bankrupt Laws,

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may be a witness. he has now no interest. he has deeded
over his property to assignees for the benefit of his
creditors.

In case of Quit Claim Deed it has been the prac-
tice to introduce a former holder as a witness. the prin-
ciple is objectionable. it should not be allowed. there is
no warranty with the Quit claim deed. If it turns out
that the party selling has no right no title to prop-
erty the grantor must come back on him for the money.
As suppose A. S. wishes to purchase Black acre of T. S.?
T. S. says you may have it for \$1000. A. S. gives you
a Quit Claim Deed, but will not warrant the title. A. S.
agrees to the bargain & takes possession. now if T. S.
rejects A. S. and it appears that T. S. has no title to the
land. A. S. may come upon him for the \$1000. the con-
sideration has entirely failed. T. S. then is interested
& cannot be a witness. But if it was a bargain of
hazard it would be otherwise. e. g. Suppose T. S. is in
possession and he tells A. S. this land is really worth \$2
1000, but if you will agree to run your chance I
will quitclaim my title to you for \$500 and the offer
is accepted & the bargain closed. Now if A. S. is rejected
he cannot recover back the money, so that T. S. is
not interested and may be a witness. The same on this
subject has been the subject of much contention among
Lawyers. but when the bargain is one of hazard
he cannot be a witness. See also commenting this matter
in Court House Dec. 17. 1812. and reports in Court House
Page 15. Volume 1. 3-

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Jul^y 5th Nov^r 4th 26th 1813.

On the subject of a Trustee, who has the legal title only, and in that sense always so far interested, that the suit must be brought in his name, but the beneficial interest is in another; Second^{ly} observing, that the principle is, if he is not liable (being in no manner ^{or} in any way exempted from all liability) he may be a witness. Thus if he is liable to costs &c. It follows that in all cases where he is not a party to the Record, and he is called in to testify respecting the property to which he has a legal title &c. it is no objection that he is a Trustee. This holds true in all similar cases - not being a party to the Record it is impossible that he can be liable for costs - as if C. has the legal title to property, but A. & B. claim the beneficial interest - C. may be a witness. 1 B. & P. 290. Dong v. Wells 10 W. 405. 1 B. & P. 305.

You recollect I stated to you that a person who believed himself interested in point of honor would not be a witness. A case - a witness was objected to, on account of having made a ^{contract to} lease of a farm of Land in case one of the parties got his case - He considered himself bound in honor though under no legal obligation to lease or account of the Stat. of Frauds & Perjuries. The Ct. excluded him - the principle is, that if the witness expects to derive benefit, or to lose on a pecuniary point, arising by the determination of the suit, he is excluded Vol. 21.

I will show by an example the strength of the principle of interest operating to exclude a witness.

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Suppose A is Tenant in Tail and B is entitled to the reversion of it. If it ever comes. It is doubtless familiar to most of you that the tenant in tail can at any time cut off the reversion. Now what is B's interest worth? Not 10 cents, for it is in A's power to do so at any time and turn the estate into a fee simple. It is possible however that A might not do this and that it will descend to his issue. Lives all of them are extinct, & then it goes to B. Now B. cannot be a witness because his interest is a real one, and one which he can at any time dispose of. But on the other hand, suppose A's Son, who perhaps is to inherit that estate, is called to testify, he will be admitted. Relationship does not exclude - the Son may be cut off, his interest is only in expectancy and not certain - nor can he dispose of this expectancy, as a reversioner can of his interest. Notwithstanding his feelings and expectations he is admitted to testify. But when there is a real interest at the time he must be excluded, no matter how small the amount, is -

I pointed out the principle on which husband & wife could not be witnesses for or against each other. It was not on the ground of interest, but to preserve domestic tranquility. There is a case in 4 T.R. 378 & another in 2 T.R. 283. Both of which establish the principle. The husband was called upon as a witness in an action concerning property which belonged to her. He had not the least interest in the case. But this was the only objection he would have been a competent witness. but Ch. J.

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rejected him, on the ground that it was bad policy to admit Husband & Wife as witnesses for or against either as it w^d tend to disturb the peace of families.

A Question has been made whether a Wife *de facto* (the husband having another) can be admitted a witness in a dispute respecting his property. What motive is there to induce her exclusion? The Law is not over anxious to preserve domestic tranquility in a family when the head of it has been guilty of Bigamy. She was denied she was interested. But she certainly has no more interest than any other person, & she is admitted her as a witness.

If a Woman who has been forcibly married is admitted as a witness in an indictment, is she thus barred for the forcible marriage. This point has been much litigated, but I do not know why it should have been. It was determined that she was a witness to prove that he had been guilty of an offence in forcibly carrying her off - not to prove that she was not married. The courts not have been a witness had she actually have been his wife. but was admitted on the ground that she was not married. the marriage contract was void as obtained by duress. In any case of this kind where a man carries a girl before a Justice is he forcibly & he (for the sake of his fees) mumbles over the ceremony & declares them "man & wife", or where the marriage has been procured by other means, false affirmations, schemes &c. the contract ought to be void as much as it is in case of fraud in other contracts. Is not?

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be treated as utterly void. but yet it seems to be thought by many that the contract is binding. but I suppose that if a contract for a loan of money to obtain this clear sheet paper, is considered as void, so ought this to be. I have no authority on this at present. - you may see 1 Hals P. 2. 693. for 7th principle

There has been a Question of this kind: may a divorced wife be a witness respecting any thing that happened during Coverture? The principle of tranquility does not apply here nor is there any interest. It has been determined that she cannot be allowed to testify, & correctly I think. I think it, it was on the ground of its being originally a confidential communication - It is strictly analogous to the case of a party confidentially communicating a secret to his friend - and yet it has been decided that the friend may be compelled to disclose it. tho as I remarked before, I think ~~that~~ it morally wrong to compel a disclosure. The wife is in this case excluded on the ground of its being a communication made to her by the Husband at a time when he knew she could not be compelled to disclose it. I do not know that this case is anywhere reported. you may see it however in the 4th ed. to Peake's Ed. of Evid. - As to Confidential Communication see 4 T. 6 431.

There seems to have been a revolution in opinion, with respect to a person's being obliged to testify as to what would subject him civilly or criminally. The rule is still that no one can be compelled to subject or criminate himself. but the language of Elementary

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Writing is apt. to mislead. They say a person cannot be compelled to disclose that which relates to their own turpitude. It by this we are to understand that a man cannot be compelled to disclose that which will convict him of a crime, it is correct. - but if this is not the meaning it is incorrect. - That a person may not be compelled to relate that which will render them base in society, when the fact is otherwise well known is incorrect. - Suppose e.g. a woman is brot. into Ct. to testify to the father of a Bastard child. She may be unwilling to testify to the father of it - but the Overseers of the Poor have a right to her oath in order to charge her with the maintenance. The objection is that she is not obliged to testify to her own turpitude. - But in this case she testifies to no turpitude of which she is not before well known to be guilty. - unless indeed it sh^d. be more infamous that one sh^d. be the father of it. than another. But this the Law does not suppose. - It is however an acknowledged right, that Overseers of the poor, Selectmen of the Town &c. have to ascertain whether, that in the event of its becoming a pauper, he may be obliged to support it. I am not much in favor of such rule, for in many instances where the Father & Mother have settled it, I think it is a pity to compel her to testify, & thus by publishing the fact, disturb, & perhaps destroy the tranquillity of families. [I suppose the Judge means in this case that the Father or mother of it, were tied in the bonds of wedlock to another.]

Ms. A. 9. 2. 1008, 18th. 4. 25.

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The next class of persons who are excluded from testifying are those who are Infamous.

I have sufficiently explained what is meant by the word "Infamous" in the Books & former writers that it was not the infamy of the crime, but the infamy of the punishment, which worked the exclusion, is now exploded. The rule now is, that it depends upon the infamy of the crime - a conviction of that which goes to extinguish all character for integrity. For if the Legislature should pass a Law that who ever should be convicted of drunkenness s.t. stands in y. Pillory, a conviction of this offence would not exclude him from testifying - it would not destroy all his character for integrity. - So that it is now the infamy of the crime which excludes. I have already mentioned that other crimes go to the credibility of the witness. With respect to the Record being the only evidence I shall say something hereafter - 32 L. 428. 2 Wils 18.

In Count. our Courts have (by 2 or 3 decisions that are not now recalled) dispensed with the rule that a person convicted of the crime of false cannot testify. I should say "Stare decisis" but the rule has been dispensed with. The principle on which the rule is established is this - that a person guilty of the crime of false has lost all his character for integrity and cannot therefore be believed on a 6th of fact. Now the first case where the rule was dispensed with was a case of this kind - a young man who was in every way respectable was prevailed upon

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when about 10 years of age, to make some tools for the purpose of stamping counterfeit dollars. He was tried with the others and convicted, and as the time then was, the Judge ^{kept} stating that it was not so now, he had his run cut off. The afterwards became a very industrious, honest and respectable man, and his conduct in all respects with a great degree of propriety. This act was forgotten, and he considered a good member of society. He was often introduced at a club into Courts and no objection raised on this account. About 30 years afterwards he was brought to testify, and was objected to, and the Court of his conviction produced. The Ct. said the reason of the Rule was founded on the presumption that a person convicted of the crime, false counts, would not speak the truth. but that in this case his after life of 30 years, during all which time he had conducted himself properly, rebuts the presumption that impeaches the witness. The meaning of the decision of the Ct. is, that the presumption of the rule may be rebutted. In another similar case they decided in the same way. In a third case the Ct. refused to admit him because there had always been some suspicion as to his conduct - his after character was not good. In the last case they admitted the error of the rule in its full extent - in the two former they dispensed with it. I think it is binding on its established maxim, saying to say, "Stare decisis" is one of the most important maxims in the English Law, & of great importance in U. S.

Receiving Verdict of Acquittal.

There is a rule of the Eng^l Law that when a man is pardoned, it restores him to credit, that he has been convicted of the crime, false and consequently that he may be admitted to testify. This rule is not adopted in all the U. S. I think this is not a good rule. The principle is said to be that by the pardon the convict is renovated and made a new man, & his character for integrity restored - now if the pardon was always granted on the ground of innocence, it would be a good rule. But a pardon does not do this - it is given on that ground, it is consideration out of mercy - it acknowledges the guilt, but for some particular motive his punishment is spared, but his character is not renovated. There is no presumption that he will be more liable to speak the truth after conviction & pardon, than of the punishment that has been inflicted. it is a mere positive rule - and it so, because it is so. - But it is not in all cases that a pardon renovates either in Eng^l or in the U. States, where a Law provides that in case any one be found guilty of a certain crime, which is, or is not the crime false, in addition to the punishment, he shall be incapacitated from testifying. Now whether it is of the crime false or something else a pardon will not renovate. But when it is a consequence resulting from the judgment - as part of the judgment then the rule applies. 1 Palk 389, 1 West 346, 1 Ray 380, 2 Hawk 452, 453.

With respect to the other kind of infamy this has been

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been noticed before. An enquiry may be made as to the witness's general character for integrity and truth. This does not go to his competency but to his Credibility. In Court we are much more confident in our enquiries into his character than in Eng. and much more than we ought to be. D.C.P. 276.

You may see in 3 Burr 1244. a case where a man confessed on his death bed that he had subscribed his name as a witness to a will which he knew to be a forgery. That however was what he said in articulo mortis, & the Law as to that subject has been explained.

A man is not permitted to impeach his own witness. But he is not bound by his testimony - he may prove by others that the facts were different. Every witness is liable to mistakes. D.C.P. 277.

Third class of persons, who are excluded from testifying are those whose disabilities arise on account of their Religion; as Atheists &c. The old C.P. as to this subject is entirely altered - they excluded Infidels Pagans Mohammedans and in short all who did not believe in the Englishman's God. They admitted Jews by swearing them on the old Testament. Calver's Case in Coke 16. contains the Law as it then was. He gives no other reason for the decision than that Christ has no communication with Belial. But it was soon found that there was no sense in this thing. He who believes in the existence of a Pagan God may be sworn according to the ceremony which binds him in his own Country - and a Pagan was much bound by that oath.

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oath, as an Englishman when he holds up his hand,
as was by an Irish Quaker, 1808. The rule is not per-
fectly reasonable. Bozill v. Gill, 2 Co. 145. 1 Alk 21. 1101 584.
The case in Hall 2 Co. 434 was not Law at all, it is now.

This matter is now well settled: all that is
necessary is that they be sworn according to their
own mode. For many persons think that unless
they are sworn in a certain way, they may lie. as
one fellow I knew, when asked why he was not bound
by his oath, said, "They put the Book pretty near
my mouth, but faith I am - kip it." 2 Lea 1104.

Who then are excluded on account of their re-
ligious Principles? In Eng^d prob Excommunication
is. Nothing to do with that in U. S. - it does not
in Quakers to be admitted to testify. They were exclu-
ded on the ground that ^{they} would not conscientiously take
an oath. It became very important that they might
be admitted to testify, and a Law was passed that
in all civil cases they might be admitted by affirma-
ing. Still in Eng^d they are excluded in criminal ca-
ses. In this Country they are admitted in all cases,
& no where in U. S. does this illiberality prevail.
You may see a case in 2 Burr 1117. perhaps under the
head of "Quaker", where it was urged that his affir-
mation or exculpation of the def who was charged
as being guilty of a murder, could not be ad-
mitted. The lc held clearly that a Quakers affirma-
tion could not be used in support of a criminal charge.
But they thought that an affirmation might be revised

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defence of a criminal charge, if the person charged was himself a Quaker, in order to exculpate himself. But in case of a Quaker collateral evidence, in a prosecution of the exculpation of another person, when the Quaker himself was not charged at all, they thought his affirmation ought not to be read. These are the words as he is denoted in Burr. but if Gurnea had judge. He was he said, that in case of a penal action L. Talbot & Co. admitted him and got along with it by saying it was in the form of a civil action. T. 17. 854. 872. Comp. 346.

Atheists must be excluded from testifying if you come the principle, because there must be an oath. The most honest man on Earth is not be permitted to testify without an oath. What good then will it do to permit a man to swear by the Everlasting God, when he does not believe in the existence of such a being? It is a necessary consequence of the rule that all shall have the solemnity of an oath imposed upon them before they are admitted to testify. and therefore atheists are very properly excluded. Peaks vs. H. Decker's Case Law Rep. v. White.

The principle has been extended further and persons who deny a future state of Rewards and Punishments are excluded, tho' they believe in a deity. I do not know what decisions have been had upon the subject in U. S. But in Conn. a witness was excluded because he believed death to be an universal sleep. How is Ethicism proved? It is proved by the persons own avowed professions, not by his conduct in life.

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Sect. 6th Feb. 27th 1813.

The Fourth Class of Persons are those

Wanting discretion.

Under this head all persons arranged are included? So too tho' they may be arranged only as to particular subjects, tho' they may understand the nature of an oath, yet the Ct. will not admit them to testify. With respect to Minors as I have before observed, no precise rule can be laid down, except that at the age of discretion, which by some is said to be 14, yet I believe the better opinion has settled it that at 12 years of age, they are admitted without any inquiry as to their discretion. Below this, it is an age of uncertainty, and the Ct. are to enquire into their discretion, & if they find they understand the solemnities of an oath they will be admitted. Some have said that under 9 years they were inadmissible. This I conceive is not the correct rule, - but that the criterion is, whether they understand the nature of an oath. If so they will be admitted however young they may be. Str. 400. B. & P. 293. 2 Inst. C. S. 332. 455.

It has been a practice in the Eng. Ct. and sometimes in Court, that where persons are so young that the Ct. did not think it advisable to put them under oath to take their simple narrative. This is the only case except that of a man in religious doubts, where a story is received as testimony without the sanction of an oath. The narrative of the latter is usually corroborated by proving that he

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will not suffice. The fact of its loss is irreversible. You are not only to prove the loss, but also the amount of it.

I noticed that there are cases where circumstantial evidence was admitted, the higher evidence. These are where you cannot tell certainly which is the best evidence. As in case of Assault & Battery, A. & B. were standing close by the place of action, and C. and D. were a considerable distance off, and the Def. introduces C. & D. as witnesses. Now they must be admitted, but it is fair to infer that A. & B. know most about it, & were kept back - this will have considerable weight in the minds of the jury.

In case the Plff. does not introduce the best evidence the nature of the case will admit of, he will be non-cited.

I will now observe again that a parol contract may be proved by parol. But if a contract, which is good by parol, is reduced to writing, it must be proved by the writing. In case of a dispute about Land, the deed or record of it, must be produced.

Hearsay Testimony.

This species of testimony is not regularly admissible. The meaning of it is, that a witness shall not be permitted to relate what he heard another say because it was not spoken under oath. To this rule there are exceptions.

1st One exception is this. The witness having testified the opposite party may introduce testimony to

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to prove what he has said out of Court. But you can show this is not done to prove any fact or point in controversy - but to impeach his character, for truth to show his inconsistency. So hearsay evidence may be introduced for the purpose of corroborating the witness's testimony. This however is never done till he is impeached - e.g. you may prove, as a corroborator of his present testimony - that he told the same story out of Court, at a time when he could have no temptation to deviate from truth. So if the testimony is rendered improbable by the other witness's hearsay evidence, may be introduced.

III^d Cases of Confessions. what Jeff. or Dep. has said out of Court may be proved. You cannot move what Jeff. or Dep. has said out of Court in their own favor. But what either of them has said, which will operate against himself is admissible, & is considered the best kind of Testimony - for it is not to be supposed that a man will say anything, which will make vs his interest, unless it is true. But if the confession make in part vs him, & part for him, you cannot merely introduce that part which will make vs him - the other part must be also introduced. or in other words. all he has said must be told - for the beginning of a story, is often explained by the conclusion. It is not necessary that it should all be true, nor are the triers bound to believe the whole of it. This is the doctrine of hearsay testimony from the party.

12 Mod. 53. 3 Mod 259. - (Part.)

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Suppose further. Suppose a man confesses himself guilty of a particular crime. Evidence of that confession, unattended with the circumstances, which attended the commission, is not admissible. E.g. Suppose a man confesses himself to have been guilty of Forgery. Now Forgery has a technical meaning to it, and how does he know that what he has done is Forgery. The fact of a Forgery must be shown, & then his confession of being guilty, will be conclusive as to him, & hearsay evidence may be admitted to prove it. *Idem.*

Again it is a common thing for a man to confess before a magistrate, & for the magistrate to take down the confession in writing. In such cases the writing being the best, so it is the only evidence that can be admitted to prove the confession. But the magistrate is not obliged to take it down in writing, and if he does not, he, as well as other persons present at the time, may be admitted to prove the confession. *Idem.*

Further. the confession of one, can never operate as another. tho you may have even so strong ground to believe the confession true. E.g. Suppose A, B, & C are charged with burning a House. and A confesses that they all three were guilty. now this confession will not operate at all as any evidence but A. In such case, if there is no other Evidence, A may be, & often is used as a State witness. *Idem.*

There is a difference between what a man confesses in his answer in a Ct. of Chy, and what he admits in

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in his plea in a Ct. of Law. E.g. on a demurrer in a Ct. of Law, the party admits what the other has alleged to be true, or in a plea in Bar he admits of course what he does not deny. Now this furnishes no evidence to him in any subsequent case. It was an admission *pro hac vice*. Let him confess what he will in his plea in a Ct. of Law, it cannot be made use of to him hereafter. But a confession in an answer in Chy is evidence to him forever. The reason is a plea in a Ct. of Law is not under oath. it most usually is made by the Atty, & not by the Party himself. But in Chy he is under oath, & if his answer be untrue, he would incur the punishment of perjury. - *Idem*.

But still an answer that a guardian makes in Chy is not binding upon the ward. When he comes of age, he may treat it as if no such answer was made. So the answer of the naked trustee in Chy, does not operate to the *estray que trust*. - 2 Vent 70. 3 Mod 239. Esp. 752.

Confessions obtained of a person accused of a crime, by flattery, or threats are not to be proved in a Ct. of Justice. - Yet a confession obtained by flattery "that he had stolen the goods & were under such a bar," was admitted so far as to show that the goods were found there, but not to show the person guilty of the theft. *auth. supra*, & 1 Mod 53. 3 Mod 239. *Search. C. D.* 237. 455.

III^d A third Exception which is the most important, as to the admission of hearsay evidence, is this. - *What*

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What old people ~~then~~ have said with respect to the boundaries of land - as where the stake stood, where the heap of stones lay - where the line was, was ^{then} this species of evidence is more important in N. B. than in Eng. for there the boundaries of land have become permanent, fixed and well known - but here the lines have become moved in clearing up the country.

These old persons being dead others are introduced to prove what they have said when alive. If they are still living, this hearsay evidence will not be admitted, but must themselves come forward.

This is a rule introduced thro' necessity, for by it is supposed that no one knows respecting the statements of land made many years ago.

Vth A fourth exception is this, - Hearsay evidence is always admitted to show the probability of a man's death, who has gone abroad. All the circumstances, as that he was in ill health, or was in great danger at sea, are admitted. This is hearsay but it is the best evidence the nature of the case will admit of. for it is hardly to be expected that you will find a person, who will swear he saw him die. Such evidence is sufficient to induce the granting of Administration of his Estate - to release the wife from the bond of Matrimony &c many again is no offence.

Vth It is said that the Pedigree of a man, when it becomes important, may be proved by hearsay. This is not admitted in a Country where books of Pedigree are kept - but where no books are kept, there

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can be no objection to its admission. E.g. Suppose one claims to be the nearest relation of a person who is dead? Now how can you prove it? There is no other way but to prove what the grandfather, it must be said, about it. The relationship cannot be proved by any one living, but persons may know what the family always have said: & if they do they are admissible to testify.

VII. "Hearsay. Hearsay is the only Evidence in case of impeaching a man's character for truth. The Law will not allow you to prove a particular fact or blemish in the witness's character, for as that he has not come prepared to defend: But evidence as to his general character for truth may be admitted. The witness's opinion of the man is not enquired of but the reputation he holds in the neighborhood. It is a thing which witnesses frequently cannot understand; they suppose that they are called upon to say what they think or believe about him. But this is in error. Thus far of hearsay evidence as respects witnesses.

Sept^r 7th. March 1st 1813.

I have noticed to you the ground on which the character of witnesses can be enquired into. I have now attempt to show When the character of the Parties may be enquired into. The rule is, that if the character of the party be put in issue by a declaration, plea, &c. in an inquiry may be made into it but this evidence is never introduced to show that it is more or less probable that the fact has taken place. E.g. Suppose A sues B. for selling him an unsound horse. Now

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A cannot introduce testimony to prove that B's character is bad. nor can B. introduce proof to show that his character is good. Proof of his character is not introduced to show that it is probable he cheated. But you can introduce proof of the party's character, when the damage done thereby has been increased or diminished - e.g. A sues B. in Slander for calling him a thief - now on the trial B. fails to prove actual theft, but he can prove that his general character in the neighborhood is that of a pitting thiefish fellow - now B. is admitted to prove this - for this being the case, A is not entitled to as much damage as an honest man. The character is here put in issue. On the other hand. Suppose A sues B. for an assault & Battery, will A. be permitted to prove that it is a quarrelsome bullying fellow? No - for the commission of the battery is now in issue, & if B. is found guilty of this fact, he will be compelled to pay to the extent of the injury. & his character's being such as A. offers to prove cannot affect the damages. it will neither enhance nor diminish them. This distinction will always furnish a guide for you, (don't let you to reconcile cases, which at otherwise appear contradictory).

B. N. O. 226. 4 Esp R. 50?

Suppose a man sues another for Dam. Con. with his wife - Can the Def. introduce proofs to show the character of the wife or the character of the wife? Undoubtedly he may, for if she was a lewd woman.

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it would diminish the damages, or if he can prove the plaintiff's character such, that he committed adultery, or was willing it should take place, it would have the same effect. Such evidence may be introduced. But will the plaintiff be permitted to prove that D. has been in the habits of seduction? no, for this will afford no proof that D. is seduced plaintiff's wife. and will have no effect on the damages claimed.

I can mention a very good case to illustrate this principle, tho' the Law has undergone a change as to the case. An contract for an unlawful purpose, being exorbitant, were always void. But the case I allude to is where a man gave a bond for past services, to a woman whom he had kept. Now the old rule was, that if such a bond was given as premium prodictas it was good to the obligor: but, that if the woman was a profligate lewd woman before his connection with her, it was void. Now in case he refused to pay & the bond was such his character was put in issue. So that, according to the distinction, the Defl. was permitted to prove the badness of her character. for thereby he would avoid the bond. So the plaintiff was permitted to prove the good-ness of it & that the bond was given as premium prodictas, for thereby it would be enforced to him. The Law however as to such bonds is altered, and whether given to a virtuous woman or to a lewd woman will be bound by it. - But as it formerly was, the above is a very opposite case to explain the doctrine. With

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With respect to criminal cases there is some little difference. The accused may show his former good character in any case, and this whether his character is put in issue or not. But the public cannot show that his character was bad, unless the accused can disprove it to show that it was good. In such case the public may rebut what he has proved. 2 Black 722, 352.

I shall now make some remarks on the Number of Witnesses required. The general Rule is that one is sufficient. It is said it must be one Credible witness. To be sure the jury must believe him. They are not bound to believe 10 witnesses if they are incredible. There are exceptions to the general C.D. rule that one is sufficient. The civil law which obtained thro' all Europe requires two witnesses - and by this law if two were introduced to testify & one was disbelieved, the evidence of the other was not sufficient to substantiate the fact. The Eng. have departed from the rule. The reason I conceive was that the trials were originally by a jury selected from the neighborhood, where the facts took place, & ^{they} were presumed to be in a measure acquainted with them. It was therefore thought that the evidence of one together with the private knowledge of the jurors was sufficient proof. I give this merely as a speculative reason of my own. I think the English law preferable. Coath 144. Show 158. 2nd Ray 220.

It is said the proceedings in a Ct. of Ch. furnish an Exception to this rule. They do, in a certain sense.

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When Aff. files a plea, and Def. denies same & calls all the facts in issue, and the oath of the Def. is contradicted by one witness only, it will not be sufficient to entitle the people a decree. the testimony is considered as balanced. But if the contradicted testimony vs Def. is corroborated by strong circumstances, it is sufficient to entitle the people a decree. But even in Chy, where there is no opposing oath, 2 witnesses are not required to substantiate the fact, 2 term 554. 2 Row 428.

There are cases at Law where there must be more than one witness. one case is at C.D. another is by a very ancient Statute. The case at C.D. is Perjury. The same reason, viz that there is oath vs oath, applies here as in the case in Chy above, and unless attended with corroborating circumstances, the evidence of one will not convict another of Perjury. but it will if there are strong circumstances to corroborate his testimony. The case by Statute is that of Treason. The Stat. has required 2 witnesses to convict a man of this crime. But you will observe that when there are two overt acts of treason, one witness may swear to one, & this will be sufficient to convict him. (This was not the meaning of the Stat. I think, but so have always been the decisions - see 4 Bl. 357 for some qualifications to the rule). The cases of treason have been so few in the U. S. that I hardly know what rule has been adopted. I should suppose the Ct. might adopt what now is, i.e. either the C.D. or Stat. they pleased. 10 Nov 1793. 4 Bl. 357.

By

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By a Stat. in Conn. our Law is somewhat altered. In all capital cases there must be two or more witnesses, or what is equivalent thereto," & found a conviction upon. One witness then, unless this Stat. cannot convict a person, but if there are 3 or more circumstances which are equivalent to another witness, he may be convicted. The difference in our Law is made in favour of the State. The Statute is 1799.

It is a rule of evidence that what an agent of a person has said may be proved in a cause, in which his principal is concerned. (I have before said that the observations of the party made of himself, was deemed the best evidence.) Now you will take this rule with this qualification that the agent must have been agent for a particular thing - and the maxim, "quid facit per alium facit, per se" will apply. you may then prove what the agent said. But if it is a general agency the rule does not apply. E.g. a person employed to go out to Ohio to purchase Land for you, is a particular agent. - And there are cases where what a man's wife has said about him, is admitted to be proved; but this is never allowed except when she acts as agent - as when the husband sent her to contract for the nursing of a child. - What she said was admitted to be proved. So in any other action where she is entrusted as agent, proof of what she said to him, be it in, to the extent of her agency, but no farther. 10th ed. 527, 1837, De 142, 2 St. 1074.

What the wife has said, has been admitted in

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in an action brought by Huskins & wife to enforce a right of hers. It is supposed she wrote a promissory note, she asks sue upon it. Now what she has done about it, either before or after marriage, may be proved: Here she is not agent. This is a distinct case and the reason of it is, that what is proved is a declaration as against her, for it is her note and is to become the property of the Husband only on his reducing it to possession. He is joined in the suit in order to secure the debt his costs, in case he, debt should succeed - 6 T.R. 630. 3 T.R. 454. 7 T.R. 608.

Notwithstanding this Rule that what an agent says may be proved as his principal's, yet there are cases where it is not & cannot be proved. These are cases where it cannot be proved or rather it cannot be admitted, if the principal himself had said it is where a man offers to compromise - as where A sues B for 500^l and B offers to pay A 250^l to settle the suit. Now there can be no evidence in proof of this offer. It is often said as an argument that unless B had offered thus much he would not have offered it. But this is not always true. For many would give this to buy a peace with his antagonist. So we say if he admits in his offer to compromise that he owes that sum, it will be good evidence as to him - but seems if it is not so admitted. B. N. P. 236.

Again there are cases where a man is not permitted to give the truth in evidence in his defence. This is always the case where a man has been out of a

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Shewer to the world which he does not possess - as if a man without license hangs out a sign as an Innkeeper, he is liable to all the losses, which an Innkeeper is authorized by Law, would be liable - or if he passes a woman upon the world as his wife, & she contracts debts for necessaries, he will not be permitted to prove that she is not his wife. 3 T. R. 637. 2 Esp. Cas. 637. 5 T. R. 4.

Presumptive Evidence.

Presumptive Evidence is of two kinds. The first is a "presumption of Law" - no proof can be admitted to contradict this presumption - as in the two cases above the Law presumes that he is an Innkeeper: and that she is his wife. - The other kind of presumptive evidence is a "presumption of fact" - you may introduce proof to rebut this presumption - e.g. Suppose A being a poor man, holds a bond for B, (very rich) dated 18 years since - now from the circumstance of the parties it is fair to presume the bond has been paid - but this is a mere presumption of fact and may be rebutted by proving, a frequent demand for the money - a refusal to pay it - that a suit had been brought upon it before but had been withdrawn on a promise to pay, &c. The presumption stands good until thus removed. But a presumption of Law cannot in any way be rebutted. There have occurred some melancholy cases under the head of presumptive Evidence in criminal cases, which warn us to beware of its introduction, unless the fact intended to be proved by it, is beyond dispute. 12 C. 5. 10 T. R. 399.

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Presumptive evidence is also admitted to be given in a case of this kind, tho it may be rebutted. A rents D. and C. for 50^l 3^d per annum. Well says on the 1st April 1800 when the first years rent becomes due D. pays it. & takes a receipt, & on 1st April 1801 he takes a receipt - no receipt is to be found for the rent of 1802. but for 1803 he has a receipt. Now the presumption is that the Rent for 1802 was paid. for if not, why was not the payment of 1803 applied to the payment of the rent due for 1802. This having a receipt for rent due the year following is pretty good evidence that the rent for that year was paid. But this presumption may be rebutted, as by proving that B. & his wife paid the rent for 1802. and that C. had never paid it. See the general rules on the subject of presumption, 30 C. 371, 1 B. & C. 532, 2 Str. 825. 2 P. R. 1370.

Dec^r 8th March 2^d 1813.

There is an insoluble subject of which I will not treat. It is with respect to the father or mother being admitted to prove the illegitimacy of the children. It is difficult to get at the principles which govern, but I will endeavor to give it to you & the authorities upon it. It is of consequence to know whether the father is illegitimate or not, as where a parent dies intestate, & another claims the property - Now the Q. is, can proof of the illegitimacy be had from the parents? 2^d Mansfield says upon the rule that the parents may be introduced to prove that the child was born before marriage - & if it is born before marriage, it is subject to all

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to all the disabilities of a ^{bastard} illegitimate child, the
 the parents may afterwards marry. By Stat. in
 some of the States the Court holds that it must be born
 in wedlock, and not be dispensed with, so that if the
 parents afterwards marry, the offspring born to
 them is legitimate. The rule is laid down, at su-
 pre, that the parents are admitted to prove that the
 child was born before marriage. But still they
 are not permitted to prove any thing which will
 establish the fact even after marriage. E.g. the
 reputed father or mother may know the child is not
^{his} ~~his~~, as if the real father had been absent - but still
 he will never be permitted to swear to this fact...
 Cowp 594. 3d manuscripting. Hurd. 79. McC. 454.

Another Qu. has arisen. Altho the Mother
 cannot be admitted to prove the Supra, may not
 she be permitted to prove that the husband had near-
 ly to her? No - but she may swear that she had an
 union with another man - but this proves nothing
 conclusive - it only renders it probable that the
 reputed father is not the real father. you cannot
 compel her to swear to this fact. but she may affirm
 it. The rule answers very little purpose. I think.

It is also a Qu. whether persons who have lived
 as man & wife, can be admitted to swear that they
 are not man & wife? I have already seen that the
 Husbands cannot be permitted to prove this for his
 own benefit. the Law presumes the wife is his - and
 the presumption cannot be rebutted. But there are cases
 where

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where it may be necessary to ascertain whether the issue of such persons are legitimate or not, and the Parents be admitted to prove it? The Dec. gives out of cases relating to Paupers. Legitimate children have their Settlement wherever the Settlement of the father was, tho they were not born there. E.g. Suppose a man lived in the Township of A. and had children born there who were legitimate. and he is a pauper. & has no Settlement. & his children are born there. Now if he afterwards gains a Settlement in the Town of B. the children also acquire a Settlement in B. tho they were not born there. But the Settlement of an illegitimate child is where it is born. it is considered filius nullius, or is it. sometimes it is called filius populi. This brought up the Law can the father or mother be admitted to prove its illegitimacy. There was a new Dec. no case of the kind having arisen before came up, I sh^d. say it would be very useful to introduce this testimony, as the rights of the townships contending about its Settlement are pretty nearly balanced. There are but two cases on the point & they are contradictory. In Burr 508. it is said they may be admitted to prove it - in Burr 25. it is said they cannot be permitted to prove it - Peake in his cases page 32. recognizes these cases & gives his opinion but this does not decide it. However 2^d Kenyon in 5th 330. seems to favor the idea of permitting them to prove it - In that case 2^d Kenyon admitted the wife to prove that the bans of marriage were not put on.

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published according to the Stat. 26 Geo. 2.^d in consequence of which the marriage was void. from analogy then we would think he would have admitted her in the present case. In U. S. however a marriage is not void because it is not legally solemnized. the person marrying is subject to the penalties of the Law, but the marriage is good. As if a constable should purport to perform the ceremony. the constable w^d be liable to the penalty. yet I believe the marriage w^d be good.

Of Witnesses testifying.

When witnesses testify they must swear to facts, and are not to draw conclusions or inferences from them. An inference a witness may make in his own mind is not at a general rule to be regarded. The must state the facts as they exist, & leave the Ct. to draw the inferences. But there are exceptions to this rule. There are cases where opinions are evidence. These are cases where the witness is called upon to give his opinion to a fact, such as to tell the value of a House or other property. The opinions of men in such case are evidence. But there are other cases as where the opinions of Physicians is enquired of, as to the cause of a raging ^{fever}, which is attributed to a manicure. The Physicians have better means to enable them to draw a correct inference than the Ct. does. So if it is contended that a testator died insane, of course not capable of making a will, judicious persons who attended him at the time may be introduced to give their opinion as to his real situation. In cases like these the general rule is dispensed with. 1 East 89. 2 B & R. 1113.

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The mode of compelling attendance of Witnesses.

When you wish to bring up a person to testify, you must apply to the proper authority for a summons. The Clerk of the Ct. usually grants this summons & it is called a subpoena. It is a process by which he is commanded to appear under the pains & penalties of the Law in case of disobedience. but he is not obliged to obey the summons unless he is tendered his regular fee given him by Law. If the witness does not come and a tender is having been regularly made, it will be a contempt of Ct. Suppose he does come, & the cause does not come to trial on the day assigned, now is the witness obliged to remain there any longer, unless the party tendering him his pay? Some say no, & that it is not in it. I cannot find this decided by the Ct. But it is not so - he is not obliged to give credit to the party - and unless the pay is tendered to him for ^{his} attendance, he is not bound to stay. You will observe in this case a tender is sufficient tho' the witness does not accept it. After this tender & the service of the subpoena upon him by reading it to him, what way an officer who served it he merely endorses upon it, that he served it so and then returns it into Ct. it is evidence of the service. If it was an indifferent person who served it, for such a person may do it, he endorses it in the same way & returns it into Ct. but upon his returning it he must make affidavit of service. The reason why an officer does not make this affidavit is, that he is sworn to serve all process due

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does return makes. Will suppose the witness does not attend - the Ct. then makes an enquiry about him, for it may be he has good reason, as if he is sick &c. and if they can hear nothing of any sufficient cause in his disobedience then issue a Capias, to have his body taken & bro't into Ct. - Now when bro't into Ct. if he can show no good reason for not attending he is in contempt, & may v. fine - and is committed "like waste", i.e. like the trial comes on - Suppose he refuses to testify, what is to be done? why the Ct. commit him to prison & keep him there till he will swear - or is a contempt - the cause is continued & he will be kept in prison till the next term, or until he will swear - until he refuses so long that the cause cannot be continued any longer, but must be laid - It is then a high misdemeanor - Suppose the witness does the same as and Capias, what is to be done? the cause will be continued & if he is found he will be fined & imprisoned - here an important iss. arises as to the damages. Suppose the party loses his case on account of the witness' refusal to testify - now will he recover the whole damage ^{costs &c} out of the witness? No, provided he can prove that he would have gained his cause, if the witness had come forward & testified. But the difficulty is to prove what it would have been the testimony of the witness, for their evidence under oath is often very different ~~from~~ from their story told out of Ct. when not under oath. No precise rule can be given about it. The witness is not liable if he had a sufficient excuse - as sickness -

1 Ld. 210 2 26. 1181.

Evidence.

I have been speaking of civil cases. I shall now make a few observations on the Law as to criminal cases. As the Ct. of England (e.g. the Justice of the Peace) think there is reasonable grounds for holding a person to his trial - they have power to bind the witnesses over & compel them to give bonds that they will appear and testify - and if they do not give bonds, they will imprison them. This operates very hard in some cases. As if a Traveller happens to be a witness to the commission of murder, & being a Stranger is unable to procure a bonds man - the consequence is, he must be committed to prison. Now as the Law is in a particular case may operate, yet it is necessary that such a power should be lodged some where. Depositions are never permitted in a criminal case. If the witness is committed, the Ct. order his body to be brought up to testify. Now a Law. has been made whether (if he escapes) the Sheriff is liable. Nothing is plainer in my mind than that if the escape was without the Sheriff's fault (the Ct. having ordered him up) that he will not be liable, & yet in Eng. the 12 Judges who were assembled to give their opinion upon the Law, declared that there was no Law upon the subject - & in order to have it settled, the Legislature passed an act, declaring that where the Ct. ordered him up, & he escaped without any fault on the Sheriff's part, he sh^d. not be liable for the escape. This is called "Hab. Corp. ad testificandum." Comp 672. 3 Buss 1440.

I suppose you wish for certain papers in the witness's possession - (as if he is a Clerk of a Corporation &c.)

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you must then take out a subpoena duces tecum. I have known the Ct. dispense with his bringing ~~with~~ a large book in which the Record wanted is made, provided he brings in a copy, which he can swear is a true one. The parties generally agree to this but if they will not, the Ct. will allow it. Exp 405.

The mode of proceeding after you get the witness into Ct. is for the party summoning him to examine him first - & during this examination the opposite party must not interrupt him. After he has finished, the opposite party may cross examine him, & in doing this he is not to be interrupted. It was the ancient custom to keep the other witness out of Ct. till the one on the stand had testified, & then introduce them one by one - but no such usage has obtained for the last two centuries - they are all present if they choose. The witness is permitted to refresh his memory by any writing he has in his possession. If there has been a former deposition taken he may refresh his memory by looking over it. 3 T. R. 754.

Privilege of Witnesses from Arrest.

You will recollect that it is a right which every man possesses to make his house his castle, and in all civil cases may shut himself up in it to prevent an arrest. Now he is summoned as a witness, the right of the party to his testimony must be preserved. and in order to preserve this privilege the witness has a common with all others to prevent an arrest by

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Shutting himself up in his own house, he must be
permitted to go to the Court without liability
of arrest. The witness then is not to be arrested or gone
to Ct. while there, or returning home. But he must
not abuse his privilege, as by going a circuitous
route, the trifling deviation from the most direct
course will be disregarded, or by staying there af-
ter the time is over. Yet know a case where the
witness was sent about an hour before sunset
& the witness, living a considerable distance, carried
all the next morning - that was the arrest. The
Ct. held this was not carrying away a witness, for that
the witness was not bound to start for home the mo-
ment the trial was over; neither is he permitted
to delay his journey while returning home. This
privilege is a right he has without any written
protection. Now suppose J. S. a Shipp. meets T. R. a
witness going to Ct. to whom he has a writ. & arrests
him upon it. Now how is J. S. to know that T. R. is
a witness, for he will not be justified in taking his word
for it. Will false imprisonment lie vs. the Ship?
No: what can T. R. do to prove his privilege from
arrest? Why he must go with the Ship to the Clerk's
Office. & he will dismiss him on a Summons & writ
& give him a protection (a supersedeas). Now is the
suit on which Stokes is arrested at an end? No. for it is
a freedom from arrest only, not from a suit. The writ
which the Clerk grants him is called a supersedeas, or
sometimes a protection. In U. S. the Ct. grants this

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is noted down by a Clerk in Ct. In Eng. Depositions are now allowed by force of a Statute, to be read in evidence. They are taken in cases where the witness is going abroad, or is old, feeble or likely to die to be used in the case if it should come on after their death, or during their absence. These Depositions are kept in perpetual memorandums. The Eng. Stat. is generally adopted in U. S. A person cannot always be permitted to take Depositions as if the witness may attend. When the Deposition is taken by Commissioners appointed for the purpose it is filed in the records of the Ct. & there to be preserved till wanted.

These Depositions are now, as a general rule, allowed where the cause is now depending. But in cases where it is necessary the testimony sh^d. be perpetuated. But there are exceptions to this rule. as if the witness is sick & cannot attend. So where the witness is beyond seas cannot be produced. The Deposition of the witness will be sufficient to be read in such cases, unless the opposite party has a sufficient reason to object to it.

Depositions are always taken by Commissioners appointed by a Ct. of Chy. who frequently improve in a Ct. of Law. If a Qu. of fact arises in a Ct. of Chy. the Chancellor sends the same to a Ct. of Law there to be tried by a jury. He does not try a matter of fact himself. He sends all the Depositions with it.

With respect to the proceedings in Chy. with as

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as in Court & in other States where Depositions are
used by force of Statutes, which is also the case in
the Nation. &c. by force of a Stat. of U. S. certain
restrictions peculiar to each State are to be observed
in taking Depositions. In Conn. the Deposition
of a witness is not permitted if he resides within
20 miles of the Ct. - In some States it is 30 miles. In
taking the Deposition, if the opposite party ^{lives} ^{within} 20
miles he must have notice - and if he sh^d. live
more than 20 miles off but has an atty. agent
within 20 miles the atty. or is to be notified - and this
whether it be within the State or not. If neither
the party nor his attys. lives within 20 miles, no-
tice need not be given. If the witness is sick, his
Deposition may be taken tho living within 20 m.
but in such case the Justice taking the Deposition
must certify the fact of sickness - this certificate
may be contradicted, & proof made that he is not sick.
The Deposition must always be in the hand writ-
ing of the witness, or of the Justice, or of some in-
different person in the presence of the Justice. If
the party, his attys. or any person employed by him
writes it, it will be rejected. In some of the States
the C. S. rule still prevails, & viva voce testimony
only is allowed.

In Criminal cases Depositions are never
allowed. If a material witness on the part of
the public is absent, the Ct. will not usually con-
tinue the trial it is a lucky circumstance for the

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Prisoner. But if a material witness on the part of the accused is absent, the Ct. will generally indulge him & postpone the trial. And in criminal cases it is usual for the public to summon all the witnesses & pay them, on account of the poverty of the accused. But when the reason ceases, so does the practice.

There has been a practice in Court which is now pretty well established, but which lately was the cause of some difficulty. Depositions are taken in the different States by Justices. Some States give them this power by Stat. Others have no such Stat. but the Justices do it from immemorial usage. In Virginia they have no Stat. giving their Justices this power, but depositions taken there by the same Court before our Ct., and the Judges hesitated whether they should admit them. but it was finally done on the ground that it had been the immemorial usage in Virginia to take them in that way. In several of the States they have made provision to have depositions taken if a person from another State wishes them. The Justices have power to summon the witnesses in order to take his depositions, in some of the States. In others he has no such power, & if the witness refuses to come the Justice cannot compel him. Thus it is evident a want of justice will take place, & Laws sh^d. be made clothing them with this power.

The Justice must seal up the deposition & direct it to the Ct. If the party brings it into Ct. unsealed they would not receive it. The Justice

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How can I deliver it personally to the Ct. and then it need not be sent. Depositions are parol evidence, & are not to be admitted when parol evidence cannot be. They are governed by the same rules as parol evidence. Depositions once taken are still evidence in a future controversy between the same parties, if the same difficulty as to bringing in the witness, still remains. Absence of the witness may be had, as if he is now within 20 miles. But Depositions taken in a controversy between A & B, cannot be used at all in a controversy between A & C. 4th Ed. 146. 1st Ed. 279.

It has been made a Q. whether a copy of a Deposition, which can be proved to be a true copy, & also proved that the original is lost, can be admitted. It is not settled. I think it should not be allowed: it w^d be a dangerous principle.

It has been made a Q. in Cal. whether a deposition before taken in Cal. can be admitted. It has been held that if the witness has gone to Spain unknown & it can be proved that no one knows where he is, it will be allowed. 1st Ed. 448.

Q. Suppose the Deposition of a man is taken (in a proper manner) who at the time was not interested, but before it is used he becomes interested: now can it be admitted? This is a Q. and the opinions are contradictory. But from analogous cases I think the principle may easily be discovered. If the witness had no bias on his mind at the time it was taken,

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Suppose after a deposition is taken, the witness is convicted of the criminal falsity - now you cannot improve him as a witness, but his deposition has always been admitted. But it is said that it is possible to find that an interested man cannot be a witness, & that this case is not analogous to a person becoming infamous (ul. supra). This reasoning does not appear to me satisfactory, and from analogy the deposition should be admitted. But the current of authorities say it is not admissible. I cannot now find my auth. upon the 2nd. there are not any either way. See 20 p. 756. 1 St. 101. 1 Bal. 286.

Of Records.

Records properly so called are of two kinds. Acts of the Legislature: & Judgments of Courts of Justice. No evidence can ever be received to contradict them. The record is proved by nothing but an inspection of the record itself. The nature of it will not permit of parol evidence. If you attempt to show the truth of a judgment, ~~to~~ you cannot do it by parol, but must do it by the Record itself or rather by evidence of it, which is by a true copy certified by the proper officer. Fil. & Ev. 7 to 13.

Legislative ^{Public} Acts in your several States are proved by the Stat. Books printed by authority from the State. But private acts must be proved by copies from the proper officers. Sec. of State. Co. 22. 202.

When Copies are to be used in other States, they are to be certified differently, and ⁱⁿ the different

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States. Different modes are adopted. The proper officer must exemplify the Copy, but how do we know who is the proper officer? If a Clk. of the Ct. signs it, we must have a certificate that he is Clerk, & this certificate is in some of the States granted by the Judge, the Clk. in others by the Secretary of State. We must then have a further certificate that they are judges, or that he is Secy of State, this is granted by the Governor, and we must take it for granted that the person pretending is the Governor. The Copies of these Records are to be authenticated by the proper officer - there is no necessity for his oath, for he acts under oath. Suppose the proper officer cannot be had, as if he be sick or dead, then any one may copy the Record for you. But he must make affidavit that it is a true copy. You never can have an Extract from a Record. You must have a copy of the whole record, no matter how long it may be. Tit. D. Ev. 17. to 23.

A fact decided by a judgment cannot be litigated again between the same parties while the Judgment stands. The record is a bar. it is conclusive & contains absolute verity until removed by writ of Error. So if you attempt to try the Question again which has once been decided, by a different form of action as if Trespas was first tried & a judgment upon it, & he now brings trover for the same cause, there can be no recovery, for the former judgment founded upon the same injury, & the same Evidence is a Bar.

Wick
(C)

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But here you will observe that there is a distinction as to a judgment on Demurrer: If the objection is that there is no cause of action, & judgment is rendered on Demurrer, it is a Bar - it is conclusive: but if the objection raised by the Demurrer is that the Declaration wants form, a judgment upon it is no Bar. as if in a slander the plaintiff to state that the words were spoken maliciously & deft. demurs to it, & judgment is rendered on the plea. Now this is no Bar to another action, he may sue again & take care to have his Declaration in form. Gil. 2. Ev. 29. B. 4. P. 232.

Suppose in a Real action between A & B. there are 10 acres of land & the suit is brought for 5. & both depend upon the same title. now there is a special verdict finding certain facts. In another suit about 20 acres depending on the same title the former judgment is conclusive as to the party as whom it is found. & again Suppose A sues B. for a trespass on his land. B pleads (specially) a right of way - the verdict finds the facts which settle the case that he has no right of way. this is conclusive evidence even after a return by the same parties. The right must have been clearly in or due between the parties to make the judgment conclusive. I will put a case to explain what I would. Suppose B. had purchased 20 acres of A. in the middle of a very large field. now this sale implies a right (in B.) to go to it. But if B. had

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acquired his title to this 20 acres in the middle of A's field by levying an execution upon it, the law would not have implied this right. it was B's own foolish act. to have levied in this manner. Now suppose it was B. for the trespass in going over his land. & B. pleads specially his right to pass & repass. & the jury find a special verdict that B. levied an execution on these 20 acres in the middle of A's field. now the Ct. say there is no impl. right & say it is conclusive evidence vs B. But if B. had pleaded the general issue, & given these facts in evidence under it, the judgment w. not have been conclusive evidence vs him - it w. be evidence but not conclusive. it w. be what is called, Persuasive evidence. In such case it is not put upon record specially. 3 East 346. 6 Cr 7.

Whatever verdict is found in favor of a man on trial, is no evidence vs a stranger or third person. It is "res acta inter alios". The fact found is only conclusive between the parties & issues vs parties. 2^d Ray. 700. Hargr. 472. 5 Cr. 35. Doug. Hummelsby vs ope.

There is one single case where if a fact is proved for a man it is conclusive vs all man kind. it is a Qu. as to a public (not a private) right. As if the Qu. was whether such a township were obliged to build such a bridge, & it is found they are. now in this case the fact once found for A is conclusive even after it is found in another trial by B. C. &c. to try the same question. Thus in case of a private right.

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A verdict in a criminal case has been attempted to be introduced as persuasive evidence in a civil case. But it cannot be done - the parties are different. He adds, 311. 2 Ves. 246.

When property is decided to belong to y^e Public, no law can be made by third persons about it. As if such property is decided to be perfect to y^e Public and the public officer seizes the goods. Now if a person sues him he can't maintain his action. The decision in favor of y^e Public is conclusive. 2 Bl. R. 977.

Suppose you want to prove what y^e Laws of another State are. How can you do it? Why by the Statute Book. But how do you prove a private act? There must be a certificate that the Printer was authorized by the Legislature to print the Laws. How do you prove the C. Law? By Books of Reports & Elementary writers. It is always ^{also} presumed the judges know the Laws of their own State, & the C. S. Particular Customs must be proved.

Sect^r 10th March 14th 1813.

You will find cases in Chy. where third persons have waived themselves of the answer of a party - but this is not a departure from the rule that a judgment is conclusive only between the parties to it. The answer is under oath & for that reason is admissible. The rule therefore that it is res inter alios gestae does not apply. In any case what a man confesses under oath is evidence as to him - and this holds even on a Ct. of Law - for if a person makes an

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affidavit in a Ct. of Law, it is evidence, & his
answer another wishes it as such. 1 Sid. 220. Bull.
235, 7 T. R. 2.

If a person is about to avail himself
of another's answer in Ct., as the answer is then
in Ct., enclosed he must produce the whole an-
swer - one part of it may be necessary to explain
another. Verus & viva voce testimony for in this
you need not prove all that was sworn to. 5 Mod. 10.

When a man is a witness in Ct., if he
cannot after be found, that deposition as between
the parties is testimony in a Ct. of Law. But if the
witness is living or can be found he should himself
come forward. But you may use the deposition
to show that what he has now testified to is in con-
sistent with his former testimony. but this proves
no fault as corrupt swearing - for he may be mis-
taken - you do not introduce it as a deposition
but as a writing showing what he has before said -
all we as you can introduce testimony to show
that a witness has told the story out of Ct. differently,
from what he swore to in Ct. - it is to show his in-
consistency. Salk 286. 2 Stra 220. 1 Mod 283.

The judgment that is binding between
the parties contains absolute verity in it till
set aside &c. This is a judgment when the Ct. have
jurisdiction of the property & the person &c. It does
not relate to a judgment in a Foreign Country. So it
will be necessary for me to make some remarks
upon.

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upon foreign judgments. A foreign judgment is not a *Res iudicata* according to C. S. it is not conclusive, it is only prima facie evidence which stands till the presumption is removed. But the original cause of action & the validity of the judgment may be put into doubt.

With respect to foreign judgments, Mr. Johnson, that a serious question has unhappily arisen in the different States in U. S. The Constitution of the U. S. says "full faith & credit shall be given in each State to the public acts, Records & judicial proceedings in every other State." Now the question has been made with respect to the validity of a judgment rendered in one State can be inquired of in this or in other words can there be an inquiry as to the original cause of action? Some have supposed that the Constitution intends or means only that, that the records of other States shall be received as *prima facie* evidence, that such proceedings have been had & are *prima facie* evidence of their validity, but not conclusive proof of it. Thus putting them on the footing of foreign judgments. But on this construction the Constitution has effected nothing more than could be effected at C. S. I am of opinion that the record of the judgment in another State is conclusive evidence. I cannot think from the language in which the Constitution is couched that the framers of it ever intended that the judgments of the different ^{States} should be of less validity than their own judgments. It has been decided in the *St. Cl. & W. Case* that there may be an inquiry into the original cause of

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of actions. *Centurion in Penn. & Const.* When a State
departs from this (as N. H.) there is a failure of jus-
tice. We treat their judgments as domestic. they treat
ours as foreign. and the State persisting in it, will
have a tendency to stir in each other to adopt it from
a spirit of retaliation. It is to be hoped that all
will ere long consider them as domestic judgments.
as such, conclusive evidence. otherwise it tends to
weaken the bond of union. 1 Dall. 219. 201. 188. 2 Fe. 302.

Kirby 126. Crimes 460.

Judgments in Cts. of Admiralty are never
treated as foreign judgments. the *Dan. Whit. goods* case
then is the *Lex Mercatoria*. and what the C. is to
any particular country so is the *Lex Mercat.* to all
Commercial Nations. If an American Ship be seized
as good prize in London. this judgment is conclusive
in this country. 8 T. R. 230.

If a Ship is made out as neutral & insured
in N. H. for a voyage and is taken & carried into
belligerent port, & condemned as not neutral. the
owners will not be permitted to prove she was neu-
tral. to charge the Insurers. for however piratical
the judgment might have been yet it is conclusive.
[The title of "Insurance" for the full exposition of this
subject. the distinction as to those cases where the judgment
of condemnation is founded on private rights & regulations
within or the Law of Nations. &c.] Park. 413.

Some other things are called *Receivers*, tho
not properly so. Marriages & Writs are required by

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the Survey of some of the States to be recorded. We have a Stat. requiring it in Conn. but it has fallen into disuse. The oftentimes, as in case of infancy where you wish to ascertain the age it is important. But can not other proof than the record be introduced? It has been observed before, that it may. When you must have a judgment to create a right, as a judgment in rem before you can have an execution you can prove it only by the record. And in this case it can be proved that the marriage had been recorded, you must produce the Record. it is the best evidence. But if this cannot be proved, you may introduce as lower species of testimony. But you cannot prove a judgment by Parol. nor can you prove a title to land by Parol. you must produce the deed for by this the title is created. But where you cannot prove the Record of a marriage, as the Record does not create the marriage, you may prove it by Parol. The record of the birth of children in a Birth has been considered good evidence of their age. Inscriptions on Tomb-stones have been considered as testimony - so also. Almanacs have been admitted - there is no law about these they are introduced for the particular purpose. Histories are proofs in some measures - they are not proofs of any specific private right. but you may by history the time a certain order, sect or war existed. Corporation Books are evidence of transactions which took place, where the Law does not

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require them to be received - to prove what they have done. When the Records are voluminous, the bringing of them in is sometimes dispensed with, under copy admitt. *See* 43.307. *Parks* 30.

Instruments in writing of a Private Nature, i.e. Specialties or sealed writings.

These are instruments containing such contracts as the Law requires should be written.

A copy of a Specialty cannot be given in evidence, if the original may be had: but if it is impossible to produce it, you may prove the contents by the best possible evidence. *10 Co* 92. *3 T R* 151. *See* 70.526. *Parks* 96.7. *1 Atk* 546.

In Court unfortunately we are obliged to admit a copy of the Record of a deed, on the ground that the title deeds are not handed down as in Eng^d. where the Law requires the original deed itself. Thus if it comes to B. B. must produce the deed: but if it comes to C. C. may prove the copy: because to B. by a copy of the deed for the deed from A to B. is not handed over to C. when he purchases of B. In some Counties in N.H. they have adopted our rule, tho' it gives room for fraud, as a forged deed may be made out, destroyed after it is recorded & the record cannot detect it.

Private writings are not like Records, conclusive without proof of their execution. Thus the delivery admit. passes proofs. If there are not proofs in a contract which requires none they must be

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be produced in a Law, as to the execution of the instrument, but if this can be done you may prove the execution by any one who saw him sign it. and the hand writing of the witnesses need not be produced by the supposition the Law does not require subscribing witnesses. But suppose it is an instrument to which the Law requires there should be witnesses, as to a will e.g. and they are dead or absent. their hand writing must be proved. But how can you prove that they signed in the presence of the testator, which is required by Law? Only by inference and the signing of the Testator herself is also proved by inference, as long as the best proof.

Law may not prove the meaning of a deed by parol, or any condition which it does not express in the deed itself. But you may prove by parol that the deed or any other private written instrument was given to a 3^d person as an escrow, i.e. to become his act & deed when certain acts are performed or events happen &c. 3 Causes 29.

Sec^t. 11th March 5th 1813.

It is said an instrument in writing cannot be delivered to one of the parties, as an escrow. This has been conceived to be questionable, & that there was a contradiction in the books upon it. But I conceive there is no contradiction in them, as it turns on the word delivery. It is true a deed can not be given delivered to a person & become his own or the performer of a future act. but it

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it may be the performance of a concurrent act... As if in an award it is to convey 10 acres to B. & B. 1000. acres to A. - A gives B a deed but tells him, this is not my act & deed until you have given me a deed what acre. The case will warrant this distinction, and there is no contradiction. In Cro. 520, the condition added was held to be void, but it was a condition to be performed hereafter. In 26.835, it was held that the condition was not void, the deed was considered as an absolute here there was a concurrent act to be performed. In Page 884 they decide the same way as they did in page 520, for the circumstances were the same. Now the same thing is said in such case, & they would not have so contradicted themselves. The ground of distinction is clearly stated in page 835.

There is often a doubt as to what will amount to a delivery. It is certain that there need not be a manual delivery. If A. draws the dice & says it on the table & takes the money from B. who takes up the dice, there is a delivery. and in short if any circumstances show it was the intention of the parties that the dice should pass, a delivery will be presumed. tho it may be rebutted. Possession of the dice furnishes strong evidence of delivery, and the person holding it may have come by it unlawfully.

If a deed is lost, the opposite party has it unless notified will not produce it. *proff*

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proof of its contents is admitted. This is not proving a circumstance of fact by parole, but proving that you had a written one.

It is clear that between the parties there can be no enquiry into the consideration of a specialty, to define the instrument, or destroy the right of recovery. The very seals imports one at C.D. But you may show that the consideration was fraudulent.

The parties may also in some cases enquire into the Quantum of the consideration - as where there is a specialty to perform a certain act, & the nonperformance incurs damages. In such case there must be a recovery, but the damages may be trifling if the consideration was so. E.g. A wishes to assist his friend B. voluntarily conveys his farm to him with covenant of warranty. B. owns the land & ejects A. who turns upon A. Now the quantum of the consideration may be enquired of, to show he is entitled to but nominal damages. But when an action lies on the specialty does not sound in damages the parties may not enquire into the quantum of the consideration - as if it will support no action but debt - now in debt you recover (at C.D.) the whole or nothing - there is no degree of damages.

Third persons may always enquire into the consideration of specialties, when it affects their interest - as to show that it was fraudulent or that there was none at all. As if e.g. A conveys his farm to B. without any consideration. Now C.

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a Creditor of A. may bring before the Court the same as if it had never been conveyed by A. and if any Debtor arises as to his right, he may show that it was conveyed to D. without consideration.

In case of Deeds conveying Land, a Consideration is often expressed. This is prima facie evidence of such consideration. It is sometimes pretty strong evidence that it is the real consideration as where they are particular as 5891. 17. 6. 34. But still it may be rebutted.

Simple Contracts.

These are Contracts unsealed. There are cases when the Law requires the contract should be in writing - and there are cases when the Law does not require it to be in writing, & yet it maybe. So the Contract concerning Land, or to pay the debt of another is good for nothing by Parol - it must be in writing. But a contract about personal property is good by Parol. A man may promise in writing to pay 1000^l for a Horse or he may promise by Parol - & both will be equally binding. When 7th Law requires a Contract to be written no Parol proof is admissible. You need not state in your Declaration that it is in writing, but may prove it to be so in fact - but if you do state it to be in writing & found your action upon it - it is a rule in Eng^l that & W. I. generally, that you must plead with proof, that the opposite Party may have seen.

It is also a rule here that no Parol Proof

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is admitted to utter, contradict, explain or construe the written contract, even if there is an ambiguity in the expression nor can a parol addition to a written contract be proved. Pick 120. v. Gil. cas. 16. Sac 82.

But the above rule needs explanation. If there is a patent ambiguity, it cannot be explained by Parol. if the Ct. cannot understand it, it must go unexecuted. But if there is a latent ambiguity, it may be explained by parol. e.g. A. in his will, says, I give & devise \$5000 to the Charity School in A. Now there is a latent ambiguity for there are two charity schools in A. Parol evidence may be introduced to prove which of the schools was meant, as that he had frequently said he meant to leave the north school. \$5000 and had never spoken of the south school. (Powell on Dev. & P. vol. 1st. 127).

There may be equivocal words which have two significations & cause a patent ambiguity which yet admits a parol explanation. e.g. in an Italian will a testator gave a *Legacy Seniore pueri*. now you w^d suppose this meant the oldest son, but in the old technical Law Latin it means y^e oldest child whether male or female. Now parol was introduced to prove he meant his eldest son, as that he had said he w^d not give Susan any more and leave such a Legacy to my eldest son. If y^e ambiguity goes to the whole sentence or writing, you are not to explain it by parol. the instrument must fail.

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Another exception - if a term is explained in connection with something else, parole is admitted to explain it. as certain terms may mean different things in different states of a man's family e.g. A devises an Estate to B. and his children. Now you may show by Parole if he has children of so the devisees take the land as joint tenants. if not B. takes only an estate tail.

So also you may let in parole testimony to ascertain a fact, when from the nature & prop^{ty} in used & the state of the family there is a doubt what of them is meant. e.g. A woman marries J. S. and has 2 children by him. he dies and she then marries T. M. and has 4 children by him. A. devises Blackacre "to the four children of E. B." (the mother). Now parole testimony may be introduced to show the testator meant the 4 children the mother had by T. M. as that he had said "I shall give no more to E. B. 2 children by J. S. but shall give this land to the 4 children she had by T. M." now Parole proof cannot be admitted if it does not stand well with the writing as if he had devised Blackacre to the children of E. B. now it can not be proved by parole that he meant the 4 children as above. all the children are entitled to equal portions these rules apply to other instruments as well as to wills.

The following rule applies to wills &c. simply. You may resort to the state of property to ascertain what a man meant by his will.

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E.g. A. gives his land & devises his farm. Oct. 18th without using any words of inheritance. now without anything further this does not pass & give. but he adds if he pass my debts" now you may enquire into the state of property. A. had debts to the amount of 5000^l. the farm was worth 6000^l. now your words could only create an estate for life and then you it would be a hard bargain for T. to accept of a life estate when he may determine tomorrow & be obliged to pay 500^l. At the real value of the Land. therefore we may well infer he intended to give an estate for fee simple.

Again A. devised thus "I give & devise my house called the Bell Tavern to T." Now these words create only an estate for life - but there is this difficulty - A. was himself only a Commissioner. T. already had a life estate in the Tavern. it is plain then A. intended to give him the fee simple. If then the technical import of the words gives nothing, the meaning may be extended.

Sept^r 12th March 6th 1813.

Of Abutting an Equity.

Parol proof may be admitted to rebut an Equity. To explain an instrument has frequently a different construction in a Ct. of Equity, from what it has in a Ct. of Law. - or rather the rights depending on the contract are extended further in Equity than in Law. Thus in Equity the mortgagor may redeem after the debt becomes absolute - but at Law he cannot.

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cannot. In all such cases this equity implies in Chancery from the written instrument may be rebutted by parole proof. Book 117. 118. 119. 200. 25. B. & P. 29. 30. 31. 32. 33. 34. 35. 36.

It is a rule of Com. Law that when a man makes a will, the residuum after payment of debts & legacies, goes to the exec. But if testator leaves the exec. in the will by giving him a legacy equity presumes that the testator intended he should have no more - & the residuum is to be distributed this I say is the equitable construction. But this equitable construction may be rebutted by parole proof, as by showing that the testator said it was his intention the exec. sh^d have the residue. And so of a mortgage - A mortgaged his farm worth 9000 to B. for 4000. so pleads on Chy. it is true I took the mortgage for 4000 but I have since lent A 5400 I have no other security now B. will be permitted to prove this latter sum lent, and by parole, and A. will not be suffered to redeem without paying of whole 8800. The equitable construction is thus rebutted by this parole proof. So again in this case entered into a bond with his intended wife that his Exec. sh^d pay her a sum of money on his death, the bond at L. was dis charged on the marriage. But equity considers the bond a covenant - and would always enforce the payment - on the presumption that it was given in consideration of marriage; but this presumption could be rebutted by any parole proof as that he had given the money to a trustee for her use.

Evidence.

When ^{you make} an equitable claim of this nature, & go into Chy to get it enforced, you must always be prepared that you must be prepared to meet all such parol rebuttals. In States where they have no Co. of Chy, if they admit & use the principle of Equity, they must admit parol to rebut it.

This equity may be raised by parol, as well as rebutts. A. delivers money to B. as an agent to purchase land. B. takes the deed in his own name. Here in Chy A. has the equitable & B. the legal title, and if he refuses to convey to A. he (A.) may prove these facts by parol, & Chy will en f. him. ~~But~~ This is raising an equity - But B. may rebut A's equity, as by proving (by parol) that A. agreed that he (B.) might have the bargain for 300\$. You can introduce parol proof in Chy ^{only} to rebut an Equity which is not known at Law.

But in Equity parol proof cannot be admitted to contradict a writing. Suppose A. leases to B. for \$20 per ann & B. is to repair the fences. B. finds it a hard bargain which A. admits & tells him he may stay for 15\$ per ann. Now B. cannot in Equity set up this parol in opposition to the written contract, & compel A. to receive \$15. If however A. comes into Equity for the specific performance of B's contract, & Ct. will refuse A. their aid, unless he will do Equity to B. by abiding by his parol contract.

You will find much difficulty as to parol proof unless you thoroughly understand the rule.

Evidence.

There is such a thing as establishing by parol proof, that the holder of a deed, which is on the face of it absolute, is only a trustee. As you may prove the existence of a certain set of facts ^{from} which an inference may fairly be drawn that the deed is a mortgage (but to prove it a mortgage you cannot prove by parol that the contract is different from ^{what} it is as if an absolute deed is given, and three witnesses heard the grantor promise to give back the deed on the payment of a certain sum of money this parol contract cannot be proved to destroy the deed.) e.g. A owes B. 100£ by note and in consideration of this note gave a deed. Now A says this is a mortgage else I sh^d have taken up my note. whereas I left it in your hands. & you have called for the interest - besides you left me in possⁿ & have never demanded rent. (this smells of mortgage.) But in addition last year you hired 15 acres of this very land & paid me rent. From these facts it is evident that the deed was intended as a mortgage, & that B. is merely a trustee. Now this seems satisfactory until we come to the Stat. of frauds & judgments. But the difficulty is removed by the construction given the Stat. in other points of view. as if an agreement required by the Stat. to be in writing be confessed by parol. it will be enforced in Chy. so if there has been a part performance Chy will compel a performance on the other side. It is a rule of Chy that if they can get at the truth.

Evidence.

meaning of an agreement they will decree performance though it be not in writing. As this will do one where a man admits there was such an agreement. So in this case where we get at the facts from the circumstances, they say the holding of the Deed is on by a Trustee - this is perfectly correct. 3

Comparison of hand-writing.

There appears much confusion in the Books on this subject. I should think you can reconcile the authorities - indeed they are not reconcilable. The old opinion is much changed. The old doctrine of a distinction between the comparison of hand writing in civil & criminal cases is exploded. 11 Bura 642. 113 C. R. 384. Peake N. P. 20. 1 Esp. Cas. 351. 4 T. R. 497. Peake Ex. App. Curry v. Pratt. 4 Esp. R. 117.

In cases of Deeds 30 years old & corresponding possession, no proof of execution is necessary. Peake 103. 10. D. N. P. 255.

The old rule that if you prove a deed to be well executed, which recites another deed, the execution of the recited deed is also proved is now exploded Peake 100. 114. 1 Salt 286. Gil. & E. 100. Hard. 120. 2 Lev. 108. 6 Mod 45.

If the witnesses to an instrument cannot be had you may prove their hand writing, & then the other requisites respecting their signing will be presumed. If witnesses are not required & hand writing of the party must be proved if an instr. is lost, & a person swears he saw the party sign, when no witnesses were required. 4 East 53. 1 Esp. Cas. 89. 2 Ross P. 217. 5 T. R. 371 2 East 183. 250. 2 Fla. 833. 10. W. 289. 1 Fla. 34. 7 T. R. 266. 11 Bosa P. 360.

Evidence.

Formerly it seems to have been supposed that comparison of hands was good evidence in a civil, but not in a criminal case. but, at present, with respect to both, the law is placed on the same footing. Certainly it is reasonable that this should be the case - for if it can be used to prove any thing it ought to be admitted in a criminal as well as in a civil case. - If it was a species of evidence, too dangerous to rely on for proof of any fact it ought to be as readily rejected in a civil as in a criminal case. There are two kinds of comparison of hand writing. - One is where a witness is called to the bar of Court to testify whether he believes the hand writing offered for inspection is the hand writing of a certain person. In this case the Q. is "do you know the hand-writing of such a person?" If his answer is that he does, the next enquiry is, "how do you know that the hand writing which you saw was his hand writing?" If he answers "I saw him write," or he acknowledged to me, that it was his writing, this is satisfactory as to the point that he was acquainted with his hand writing. The Q. then is asked "do you think that the hand writing now presented for your inspection is his?" to which an answer will be made in the affirmative or negative - this is a comparison of hand writing, made by the witness comparing the hand writing of which he knows to be his hand writing, with the hand writing claimed to be his. This comparison may be made by the witness by examining both papers with which

Evidence

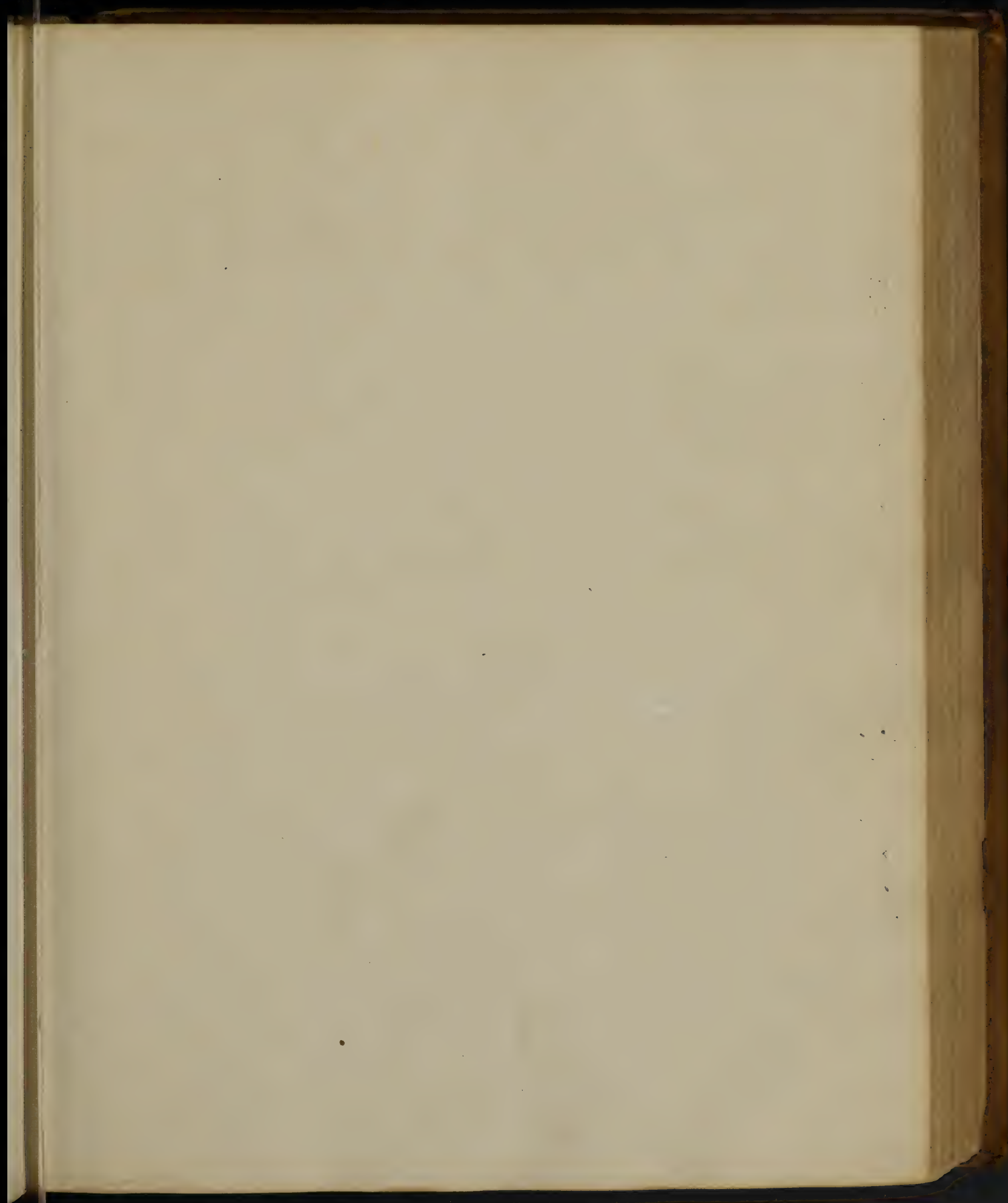
to compare it we must compare it with the impression that the writing made on his mind when he did see it. This opinion of the witness goes to the jury & is now considered proper evidence both in civil & criminal cases.

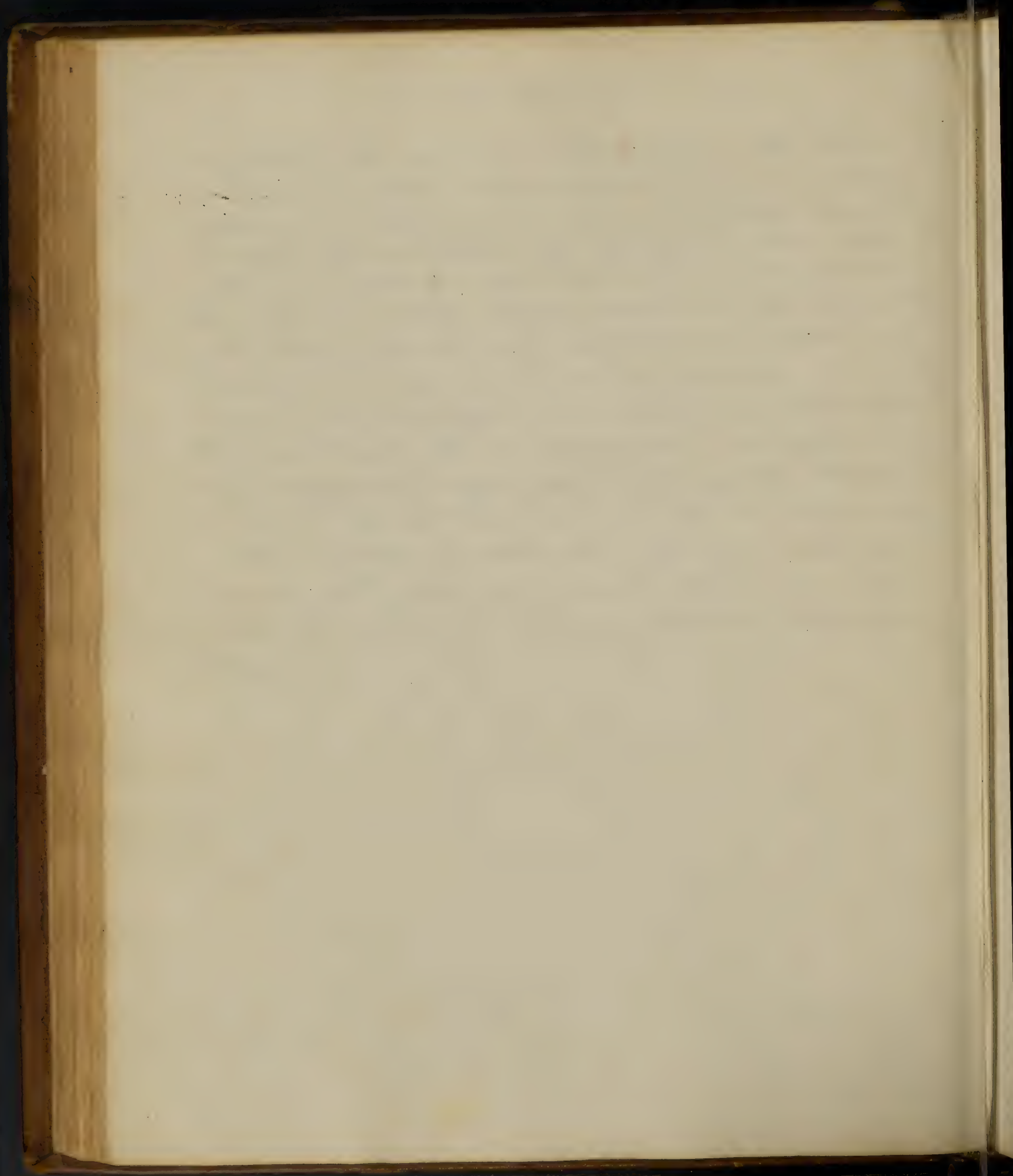
The other kind of comparison of hands is, when it has been established by the testimony of a witness that a certain paper, writing, note, &c. is the hand writing of a certain person he introduced this paper to the jury to compare with the hand writing of the papers claimed to be his from which they are left to infer whether it is the hand writing of such a person. This species of comparison of hands, altho all the opinions in the books do not perfectly agree, I apprehend is considered as improper evidence both in criminal & civil cases. You will find this ^{dis}agitated in some of the most modern reporters. The ground taken for the rejection is, that Jurymen are incompetent often to make the comparisons. That sometimes they cannot write or read themselves what in all such cases the Jurymen who cannot write must depend on the opinion of those of the jury who can write. This w^d be wholly improper, for every jury man ought to exercise his own judgment on every point which he tries.

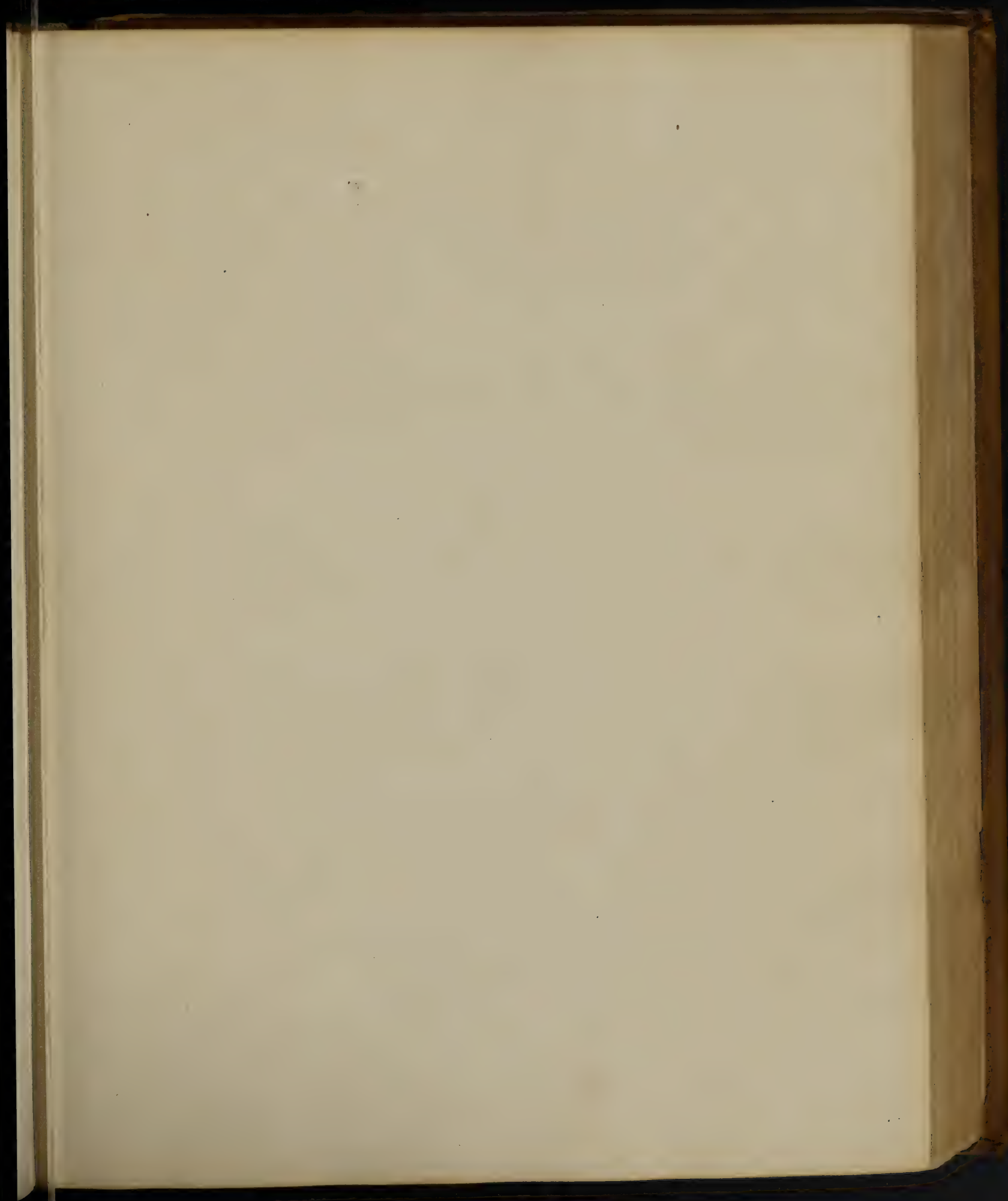
In the State of Conn. this point has been much agitated. It has been contended strenuously that however proper it might be to reject such ev^d in Eng^d or any other Country where Jurymen might

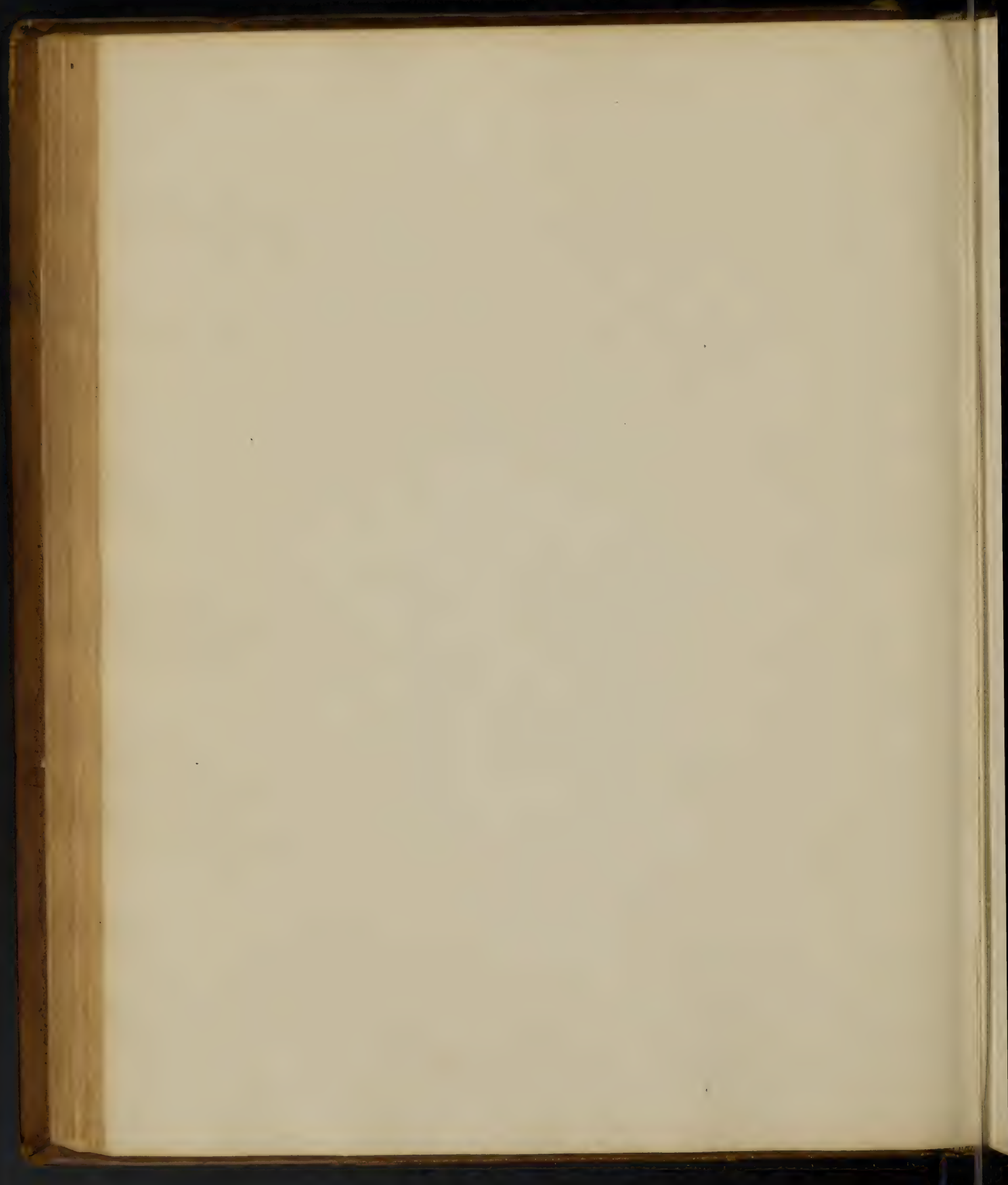
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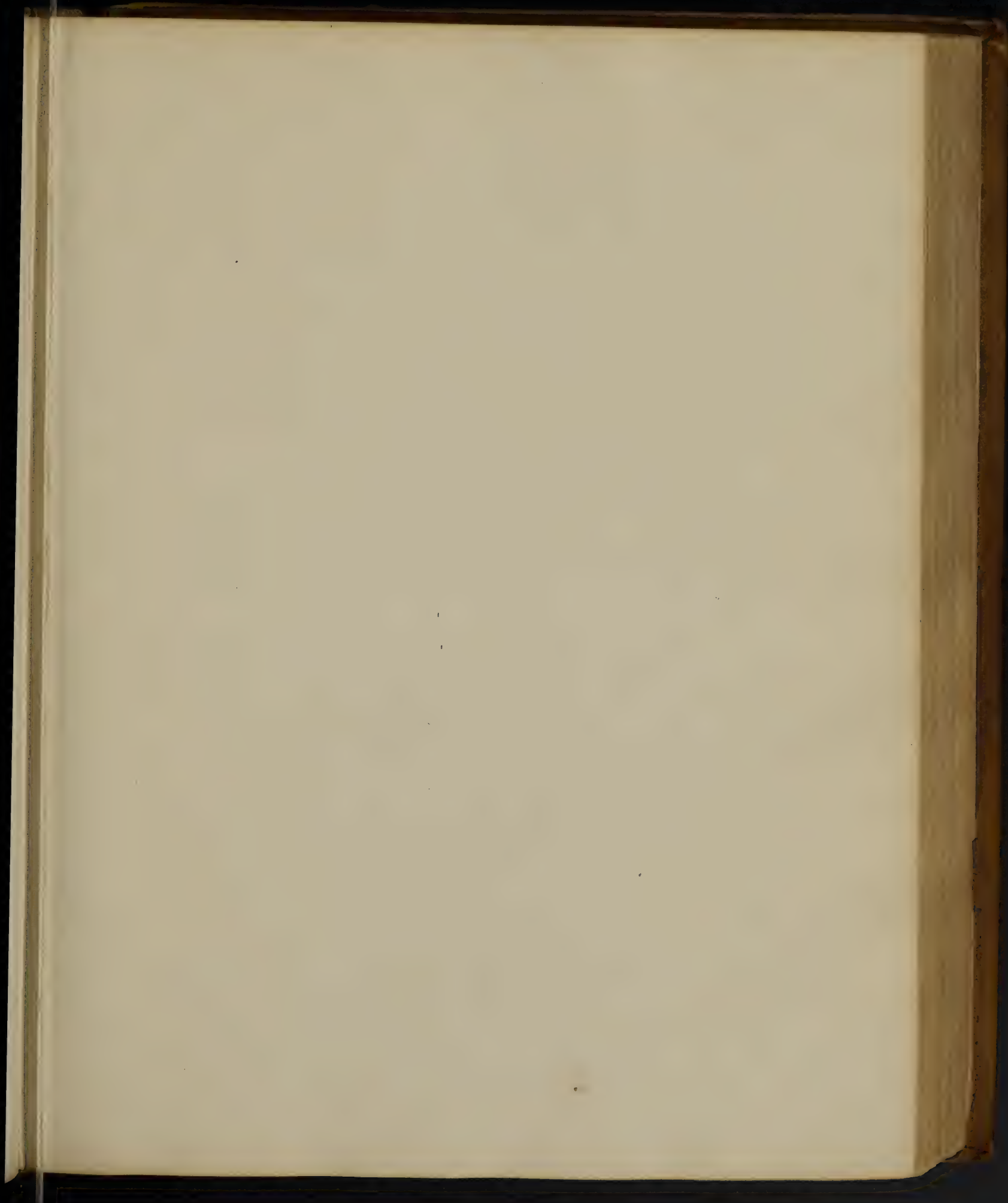
be found who could not read or write, that this was
or did not apply to Conn. where no such instance
was ever heard of that a freeman ^{is} not both read
& write. Notwithstanding this, it has been deter-
mined by the Sup^r Ct. that such ev^t is inadmissible -
for altho it is true that no instance can be found
of a freeman not being able to read & write; yet
most of them are men not conversant with such
writing. The Ct. therefore were of opinion that altho
they could read with propriety & write a legible hand,
& in many instances a good hand, yet it w^d be dan-
gerous to rely on their opinion as to the hand writing
- & it is probable that their opinion would often
be very diff^r from one formed upon a nice critic-
al examination by a person conversant with writ-
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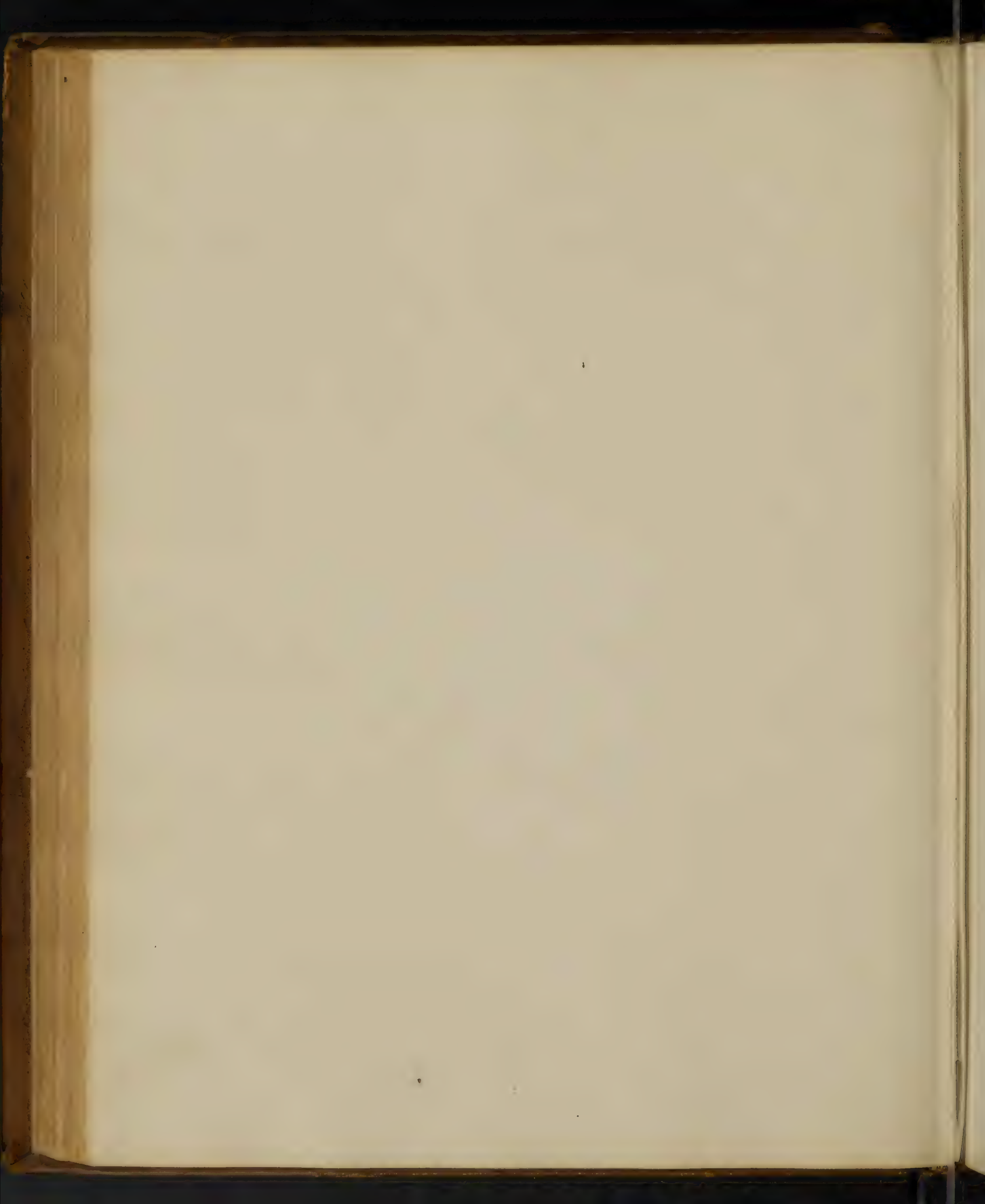


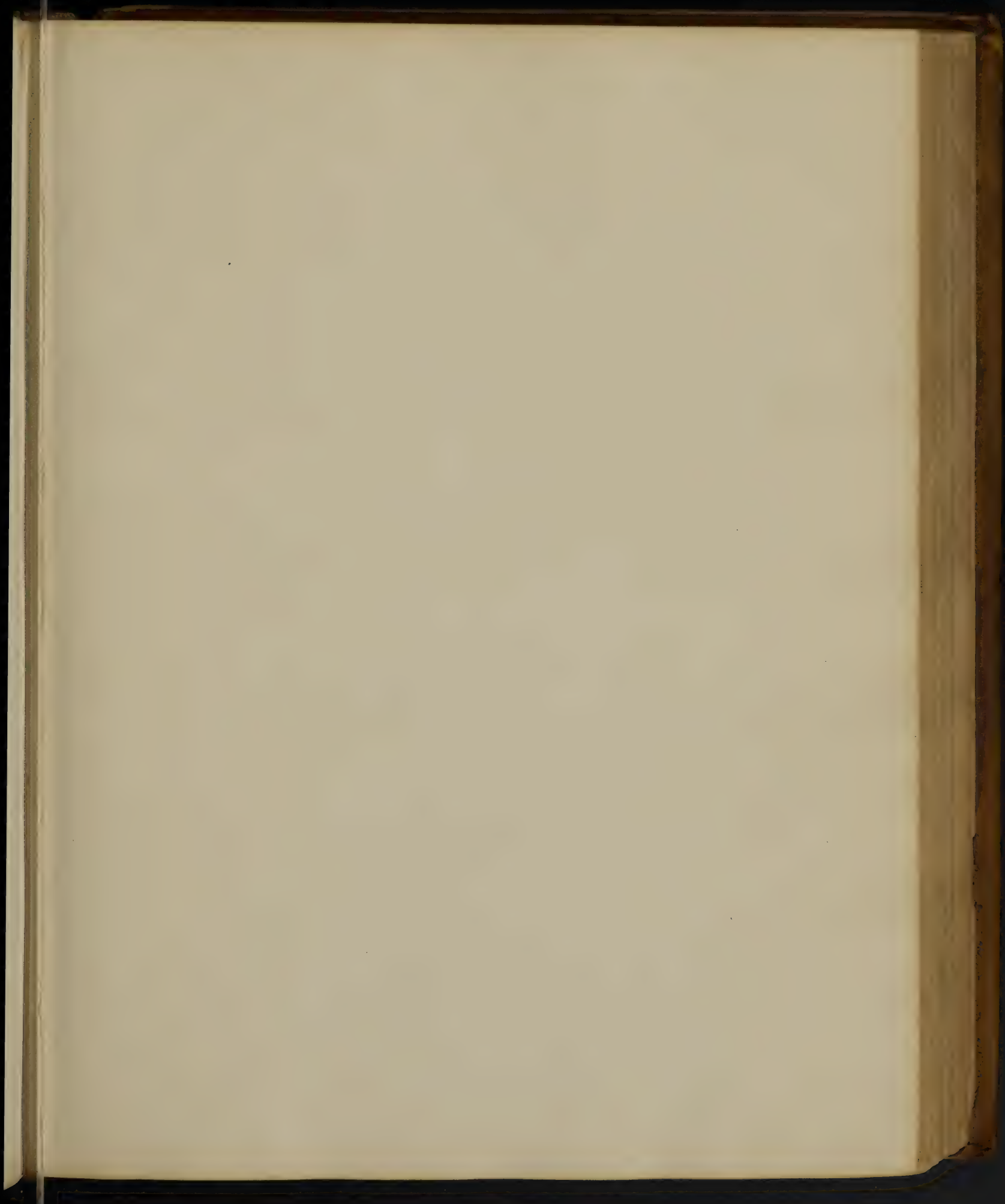


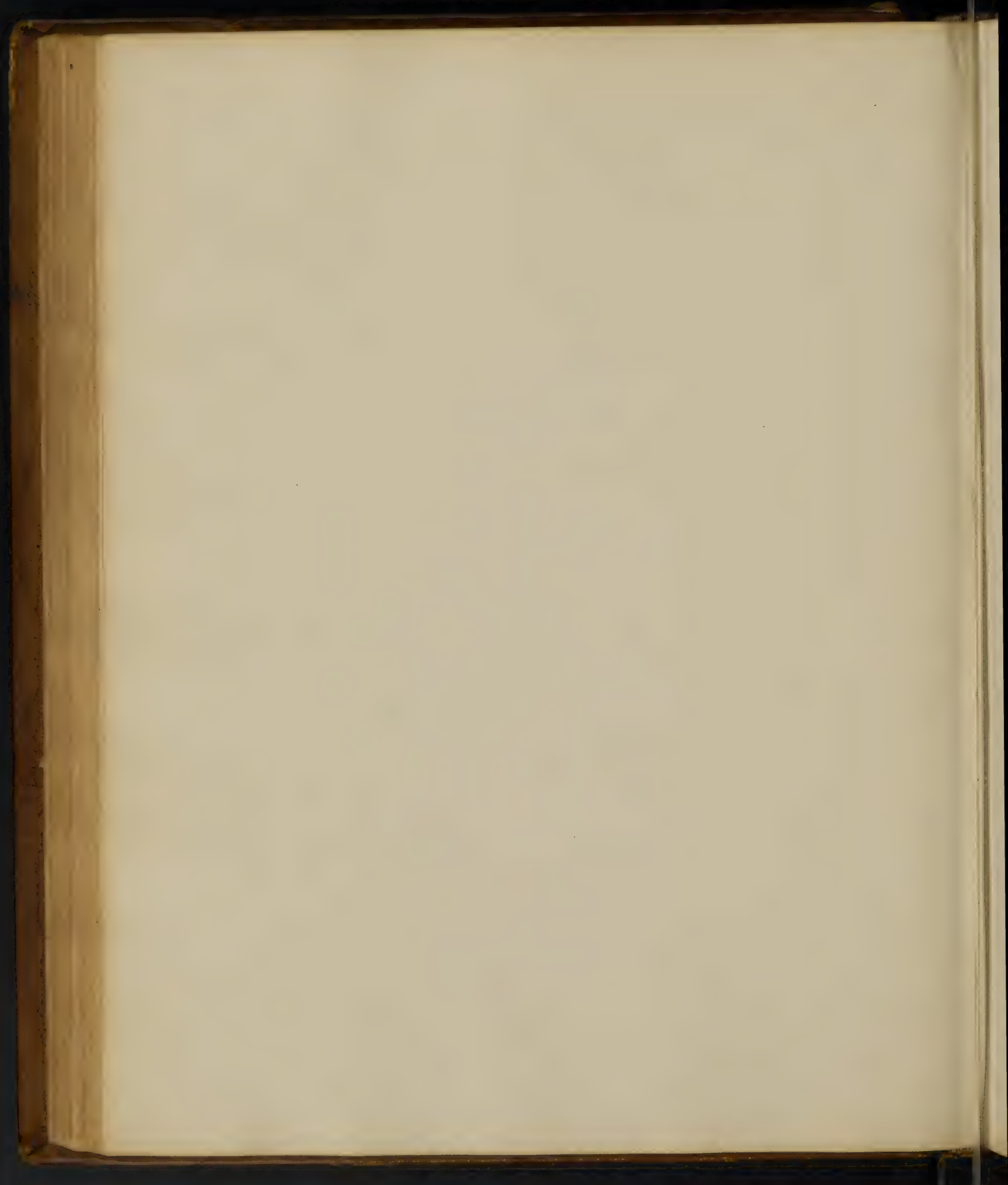


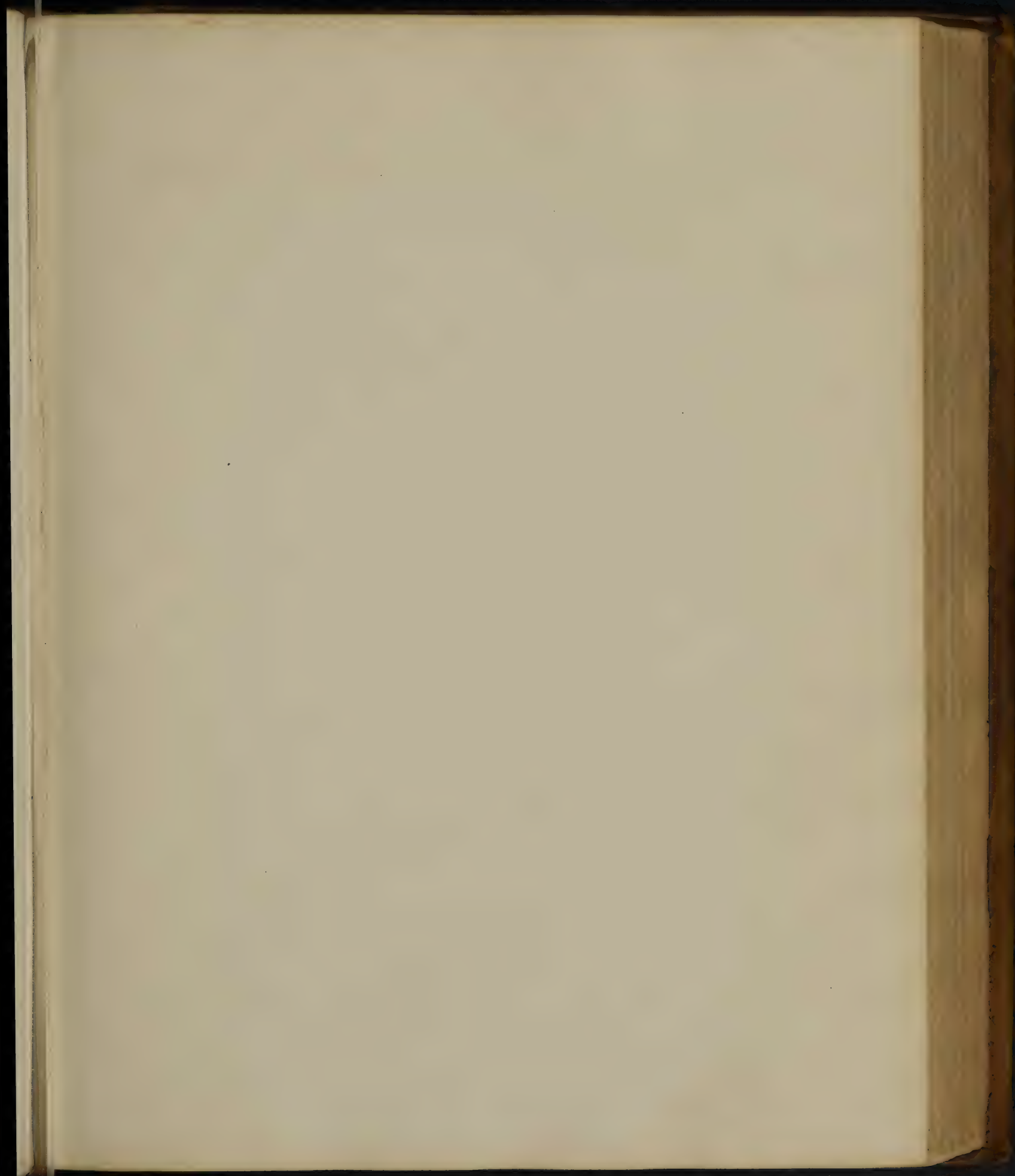


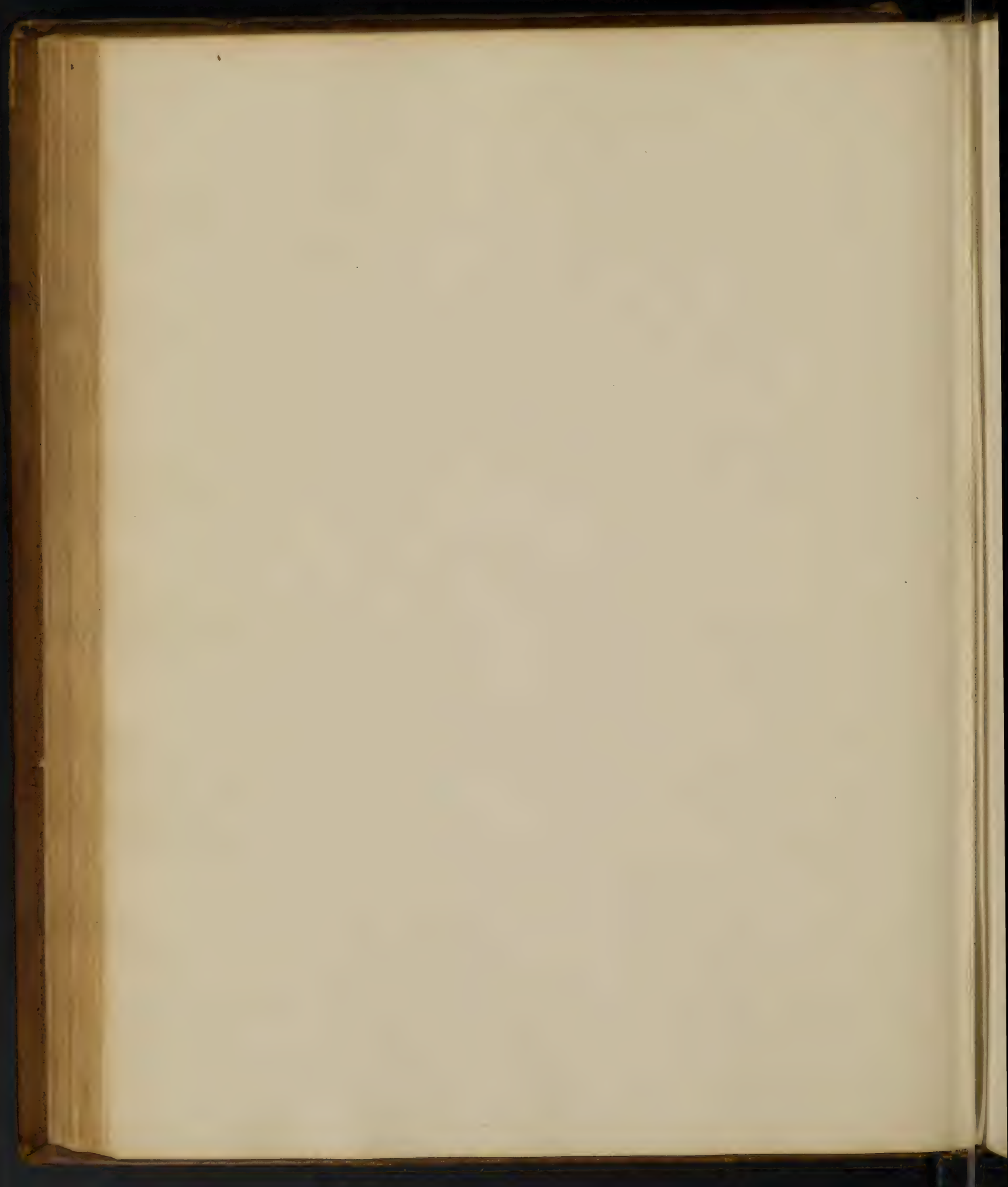


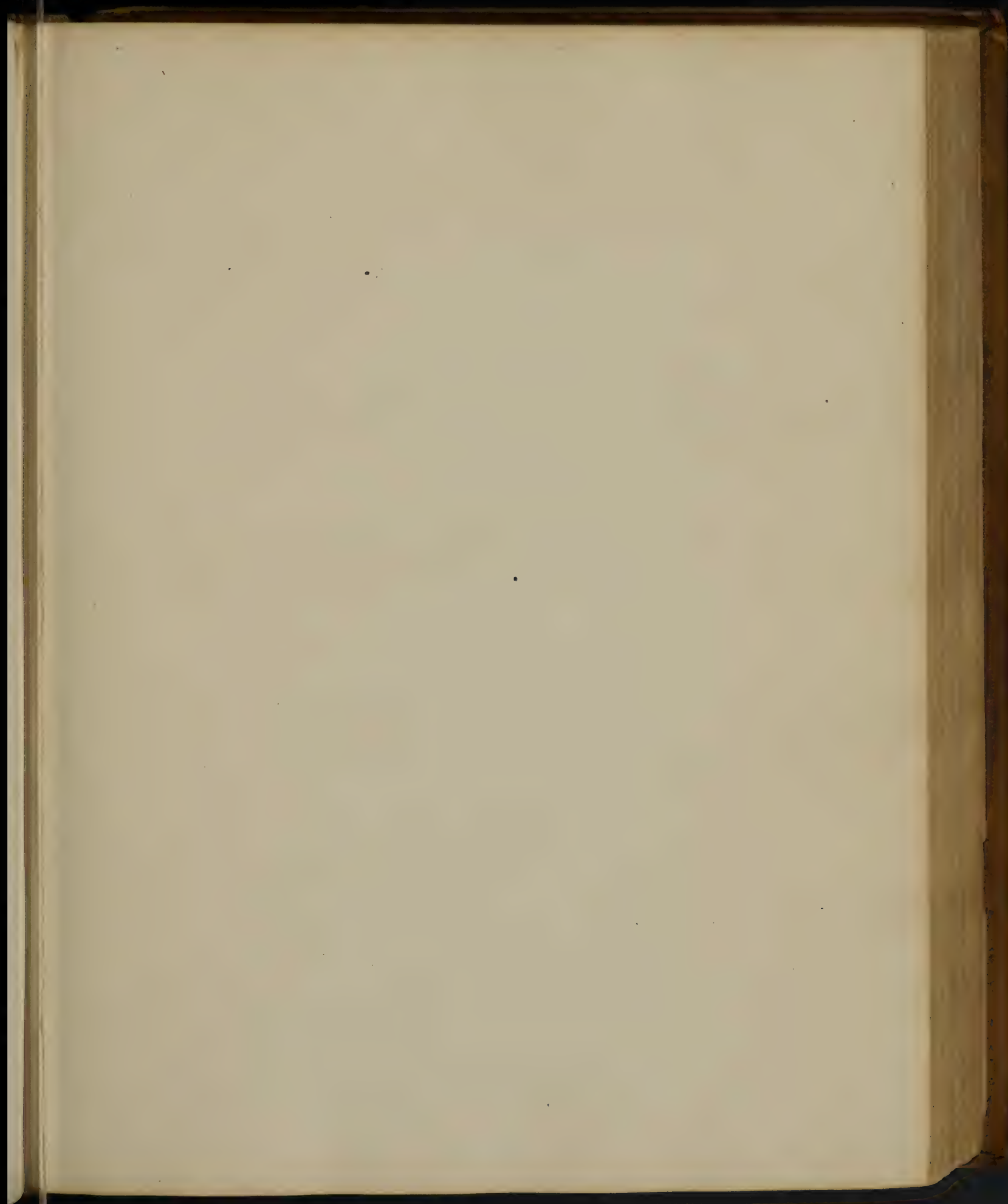


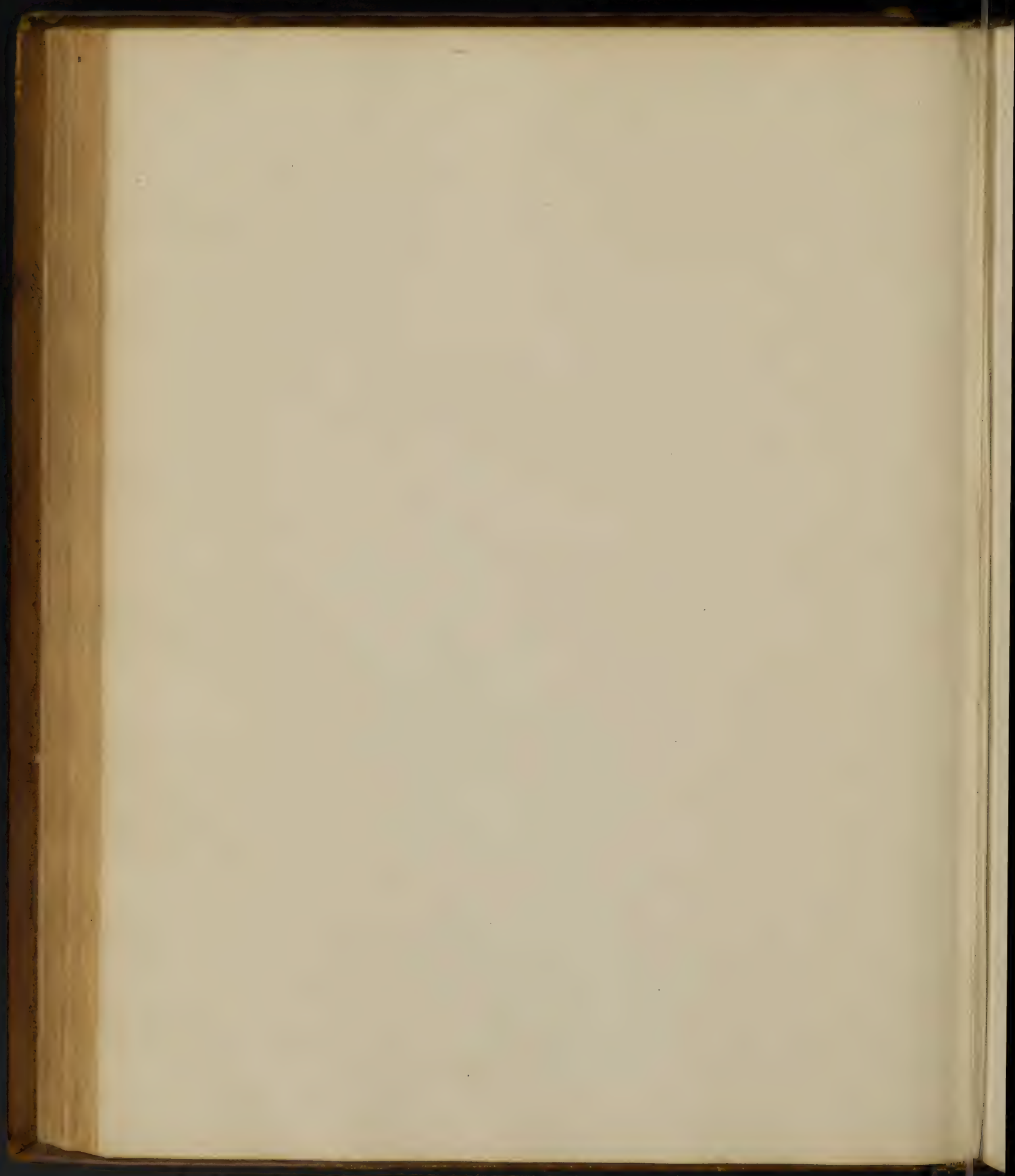


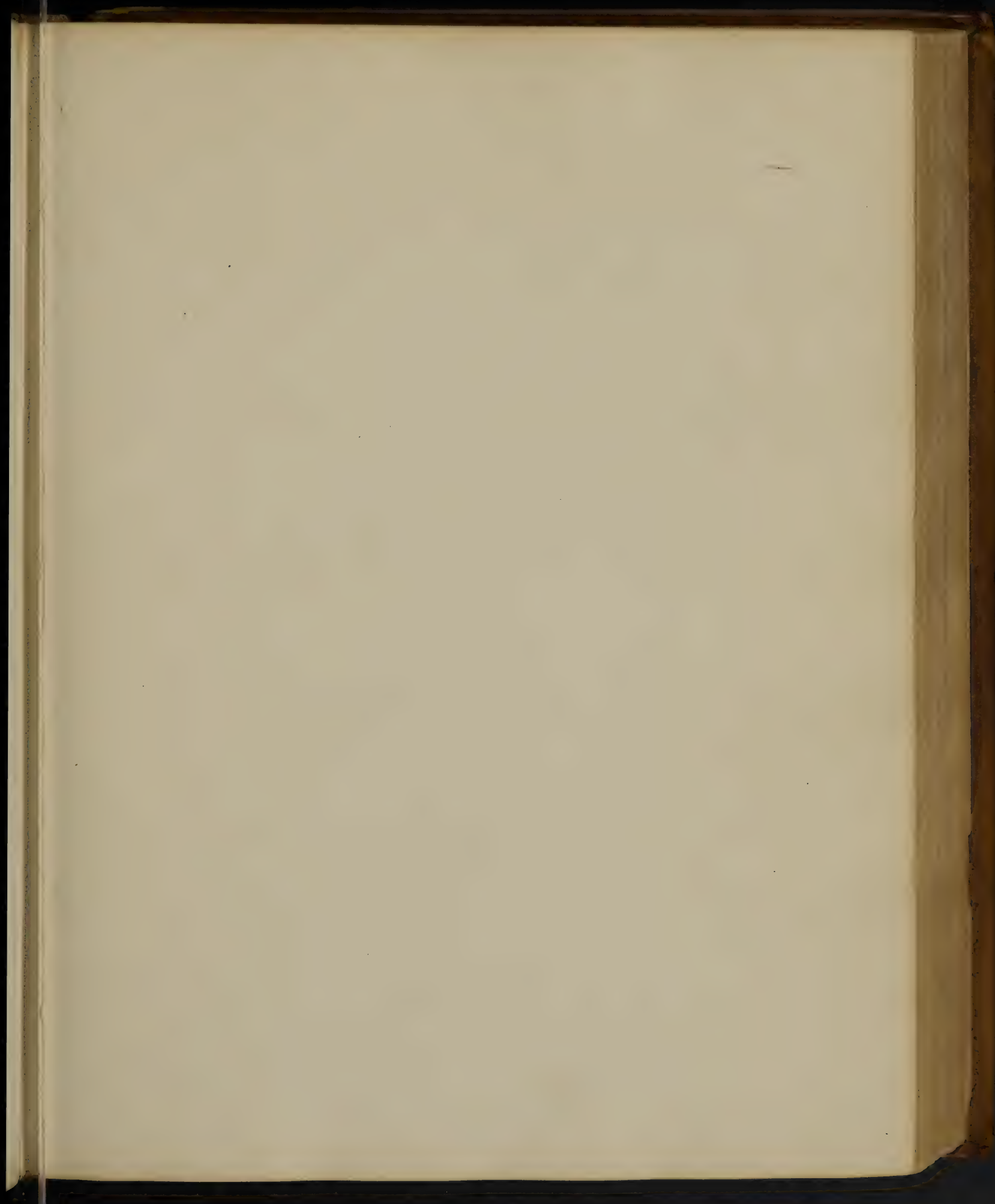


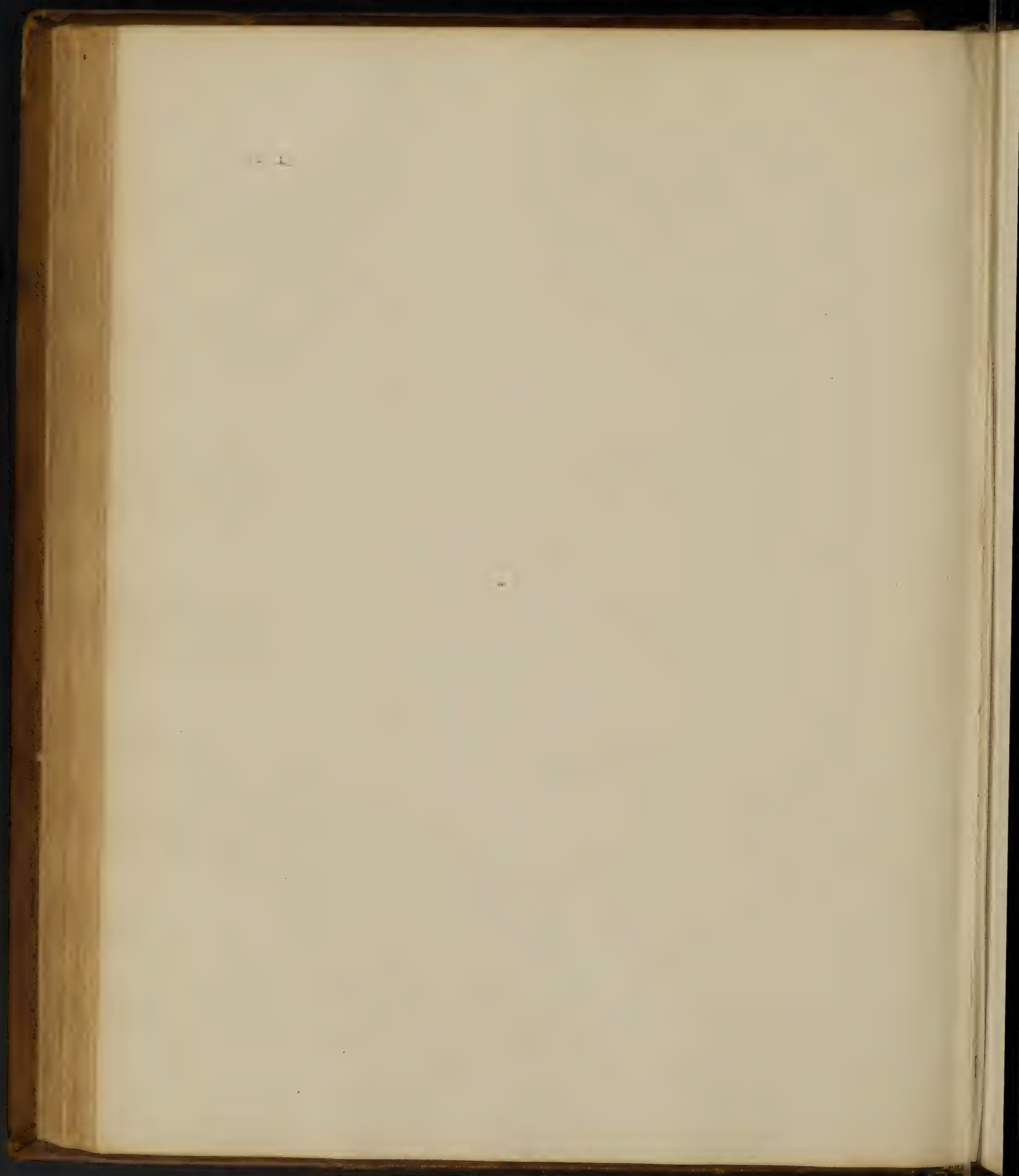


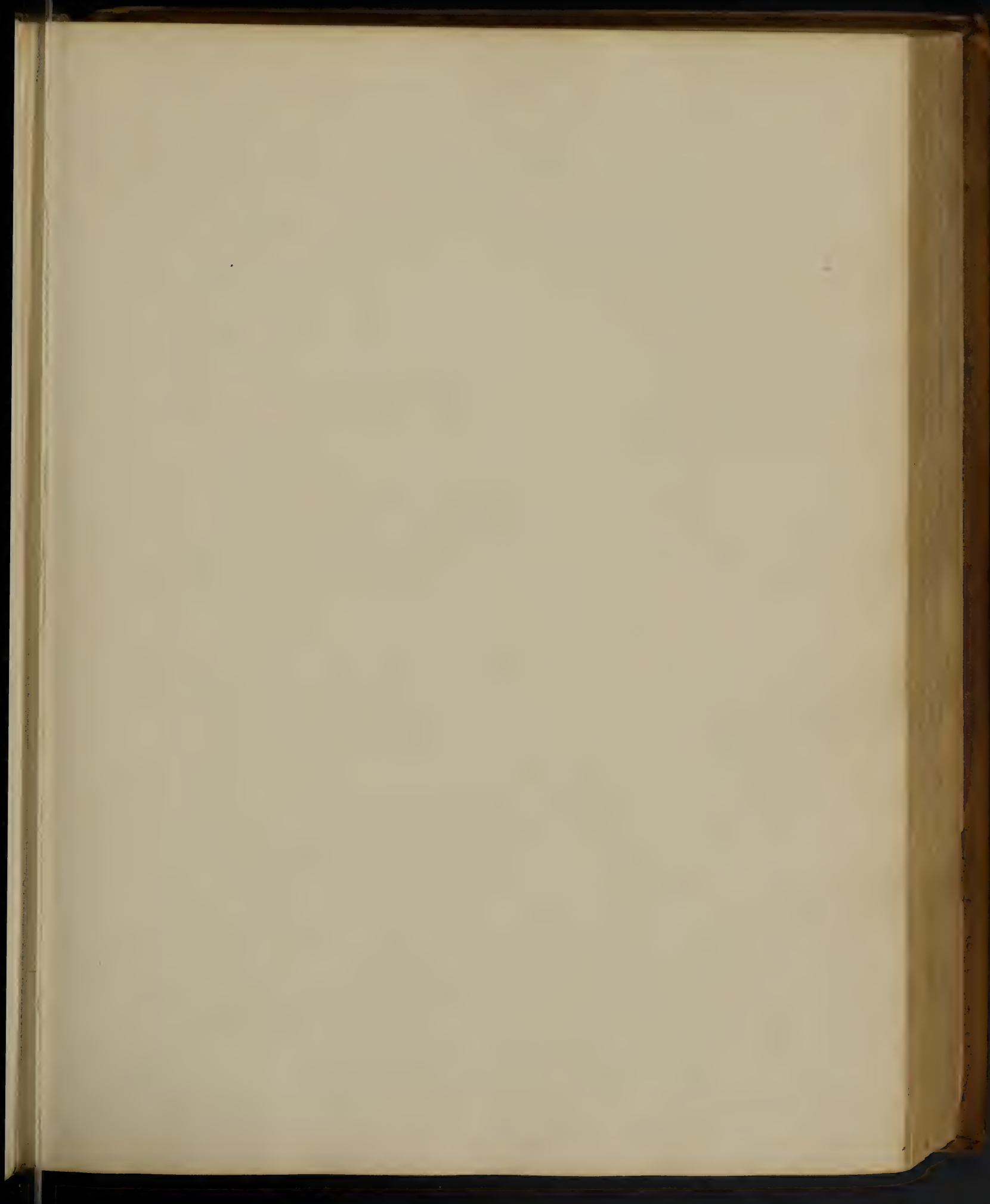


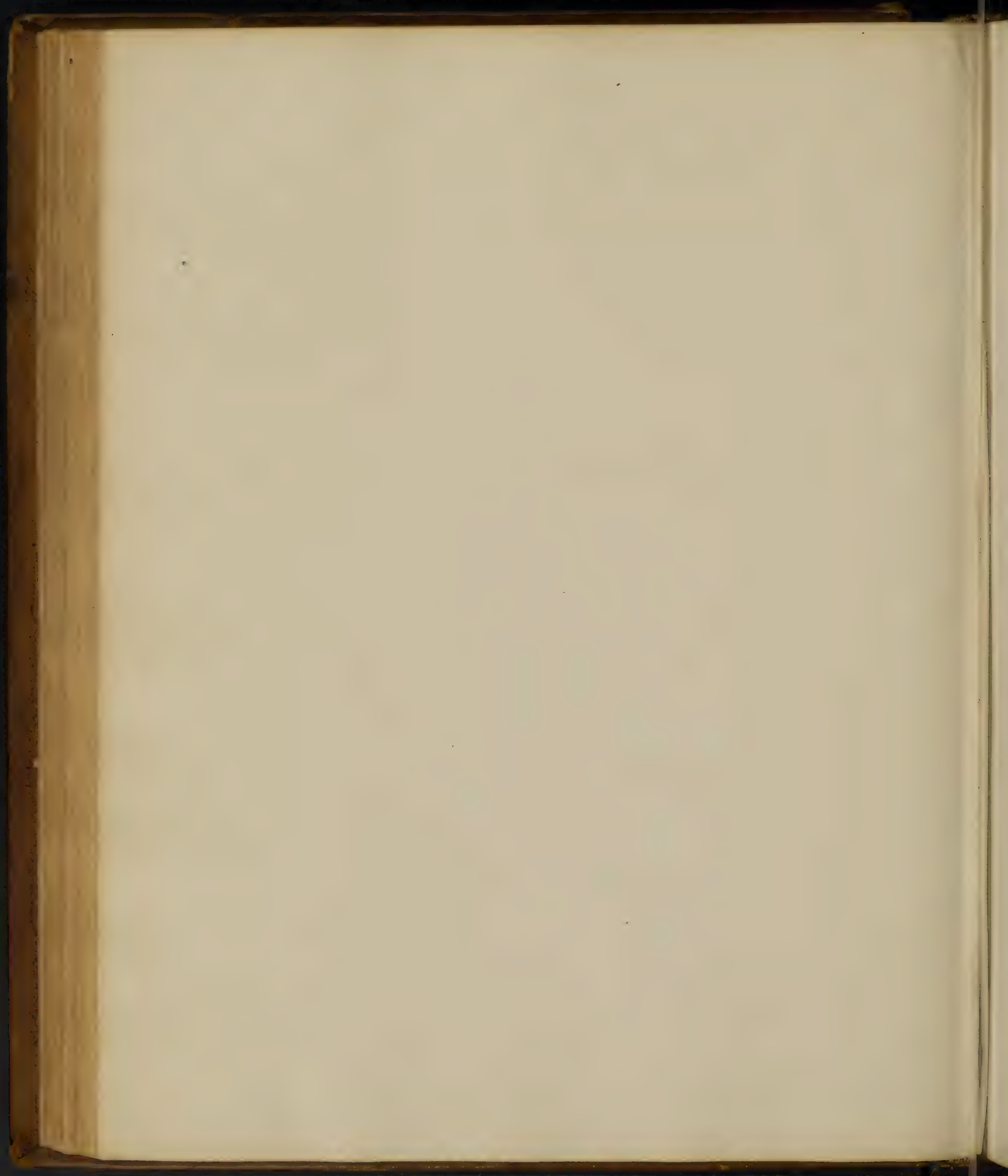


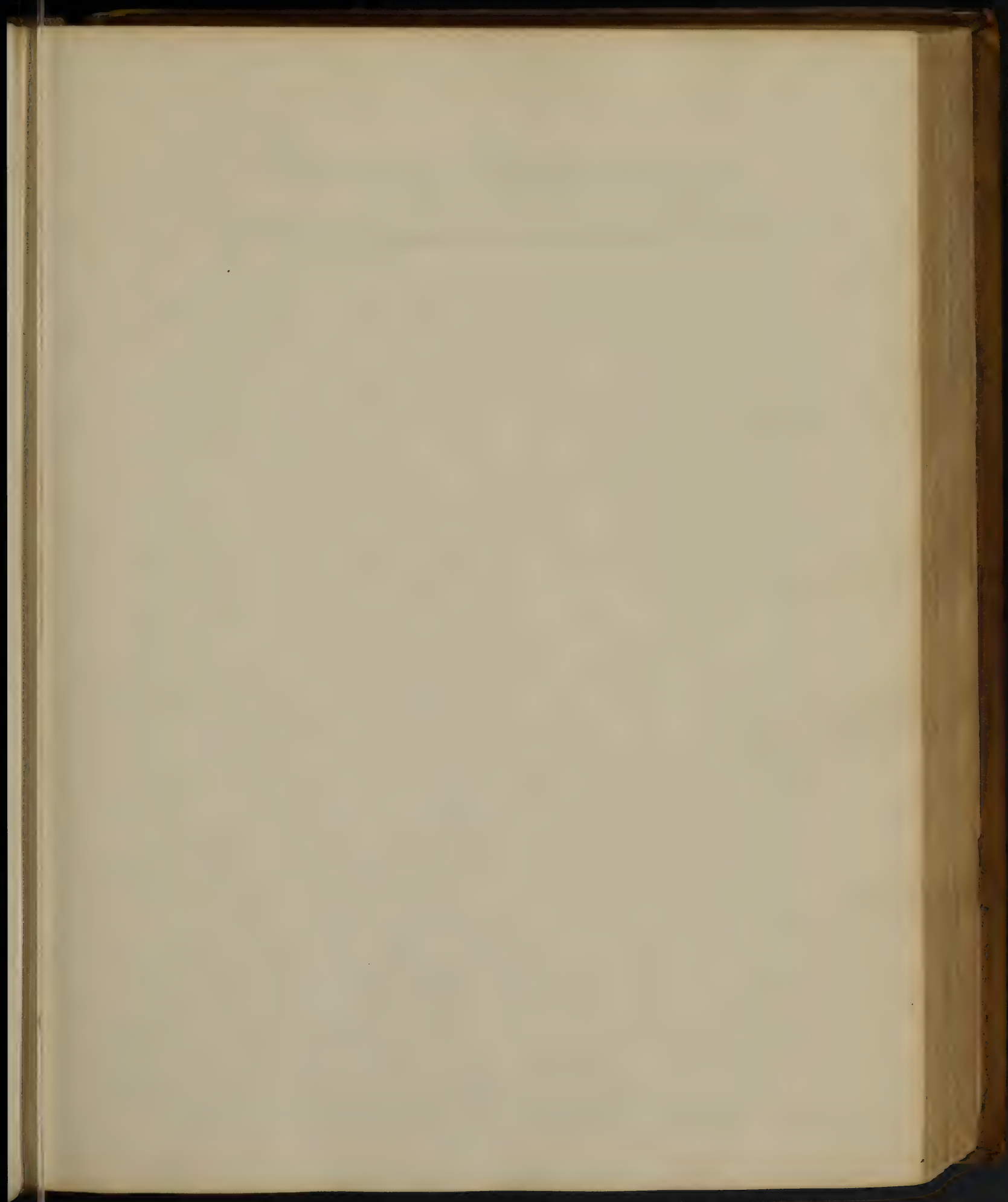


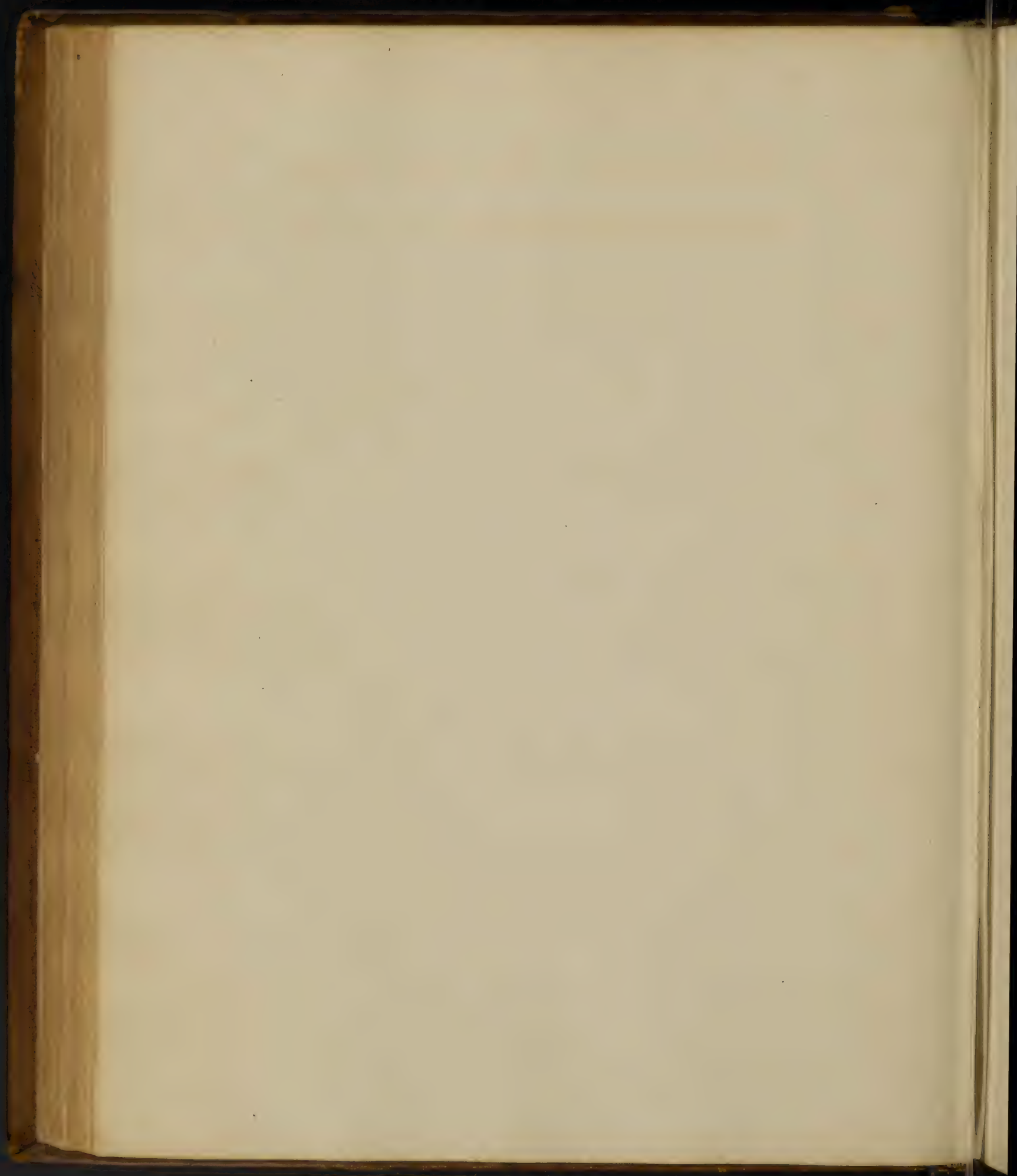












Powers of Chancery.

By Judge Reeves.

The general powers of a Court of Chancery are incapable of a ^{strict} definition. They must be learned from considering the cases & subjects about which they are conversant. By the carelessness of Elementary writers some observations have been made, which have had a tendency to mislead the student. I shall take occasion to notice these & point out the inaccuracies.

In some of the States they have no Courts of Chancery - But there the principles of Equity must be interwoven in their legal system, and without this the noble sciences of Law which has been said to have its foundations in the bosom of God, would be very imperfect. It was a long time since, that Courts of Law were found to stop short of justice, or refuse to proceed any farther than established principles & precedents would warrant. For this reason, Cts. of Chy. were introduced to extend these principles to other cases, where justice required it.

I will now notice some observations which have been made, but which are wholly incorrect.

Said Mr. James states, "that the province of a Ct. of Chancery was to abate the rigour of the Cts. of Law." By this observation one might infer that Cts. of Law were so rigorous, that Cts. of Chy. were introduced to abate this rigour, & were to do this on a distinct principle.

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The incorrectness of this remark will be noticed.

We are also told that "a Court of Chy decide according to the spirit, & a Court of Law according to the letter of the Law." This is also untrue.

So again it is said that "Cts. of Chy are peculiarly cognisable of all matters of fraud accident and trusts." This is incorrect. *Hoile 374. 10th Ed.*

So also, it is said that "Cts. of Chy are bound by no precedents." These positions are all false.

That Courts of Chy decide according to the spirit of a Law is sometimes true. They seek for the intention of the Legislators, & will apply this to the furtherance of general justice. But Cts. of Chy have never claimed that their Ct. was introduced to abate the rigor of the C.L. Therefore a Court of Equity have no control or cognizance of cases which is not within the principles of the C.L.

I will now take notice of some of the principles wherein Cts. of Chy & Courts of Law differ.

Cts. of Law decide as much according to the spirit as Cts. of Equity - but there are certain maxims & rules which Cts. of Law have adhered to as a certain extent - now a C. of Equity will extend these maxims so as to embrace certain cases, which the Court of Law as falling within those maxims, but which are not comprehended by the rules of Courts of Law. E.g. it is a maxim of the C.L. that a contract obtained by duress is void. Then every contract obtained by duress is void both in Law & Equity. The Law then

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is what is duress? It is necessary that the duress be legal, that is, per meum or duress of imprisonment, although the contract is not void at Law. If the duress be fear of bodily harm or by imprisonment, & a man is compelled to enter into a contract, it will be void and Ch. of Com. will refuse to enforce it. What is the principle in Chy why they will not carry such contract into execution? It is because the man did not enter into the contract willingly. Now this principle is extended to other cases, which in Law would not be duress. as e.g. to all cases where the contract is obtained by imposed hardship as if a Creditor has got his debtor into his power & enforces him into a disadvantageous contract. & Ch. of Com. will relieve us such contract. as e.g.

There was this case. - a Lady had a daughter of great fortune - the mother was the guardian & received the rents & profits of her daughters estate. which amounted to much more than was required by the old Lady for the daughters education. A young gentleman paid his addresses to the daughter & the old Lady appeared pleased with the match. The affections of the young people were engaged, and the gentleman requested her consent to the Union. The old Lady told him she was willing to give her consent, unless he would come into a Covenant, binding himself never to call upon her for the rents & profits of her daughters estate. For fear of losing the girl, he entered into the contract & married the daughter & then

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applied to a Ct. of Chy. they relieve him from the Contract, on the ground of imposed hardship. They extended the principle that Contracts obtained by duress are void, to this case, tho there was here no duress *per minas*, nor any imprisonment. A Ct. of Law would have refused to set aside this contract. Now the principle is, that where one takes undue advantage of another's situation, tho it is not due to force in Law, yet it is in equity, by an extension of the principle. In all similar cases to the above relief may be had in equity.

Again - there is a legal maxim, that a Contract vs sound policy is void. There are many cases of this kind of Contracts. E.g. if a man should enter into a Contract not to pursue his vocation at all, it is void - for it is withdrawing his services from the public which he has no right to do. (tho he may enter into a Contract not to pursue his business in a particular place). The Contract is illegal - not on account of any intrinsic turpitude but because it is vs sound policy. Now there are other kinds of Contracts which Cts. are admitted to be vs sound policy, but which Cts. of Law do not consider as void but will enforce them. Now Cts. of Chy will extend the maxim to those cases. E.g. the Contracts of young men to sell their expectancies were long since found to be vs sound policy. It operated as a fraud on the ancestor. Their property, which they said was to go into ^{his} hands

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hands of the objects of their operation, are distributed among knaves & sharpers and oftentimes for a small part of its real value - and also affords a means to dissipation, as it furnishes them with cash at that tender age when the possession of it tends to lead them into the path of vice. But still however against the impolicy of such contracts is yet the Law refuse to say they are void. But a Court of Chy will set ^{them} aside. This is ^{only} an extension of the maxim that contracts of sound policy are void.

So marriage breaking bonds are considered as of sound policy - yet the Law refuse to say they are void. but Chy will say they are on this ground, and also, it is a fraudulent method of counting the affections.

But a Ct. of Chy cannot declare contracts unlawful there is some legal maxim which they relate to such cases. - as e.g. Contracts obtained by fraud are void at Law if the fraud is in the execution, as if a blind man or one unable to read agrees to give a note for 500 and it is written for 5000 & he signs it. it is void at Law. But suppose the fraud is in the consideration as if it represents the land he is about to sell to B. in the State of Ohio, to be well bottomed, well watered land and it turns out to be a ledge of rocks. Now this contract is not void at Law - ~~for~~ B. has his recompense in damages. & if he has entered into notes or obligations to pay for this land, they may be recovered to him at Law. - but suppose Chy will set aside the whole contract on the ground that it is different from ^{the} contract.

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contract. B. supposes he was making. the minds of the parties have never met - therefore, say they there is no reason why this contract should bind any man here if the price was in the execution.

But would it be when they rescind a contract place the parties in status quo. as in the case of the slaveholders buying the young man, expecting that the C. have no great affection for the old known and was it inconsistent to principles might perhaps be willing to inflict a penalty upon him, yet they will rescind the Contract on no other condition than that the money he has paid be paid back.

How then is it, that C. will afford assistance in case of a mortgage? e.g. A mortgage his farm to B. for 1000\$. the Contract is that if the money be not paid by such a time, that the title to the land shall be absolute in B. Now if the money be not paid by the time the farm, &c. land is gone forever. But it is not so in C. - neither, if there are express words in the mortgage that there shall be no equity of redemption, yet will C. refuse assistance - they will give the mortgagor in either case an enlargement in which he may pay the money. Now it is said C. are making Contracts for the parties. on what principle is it that they give relief? It is merely extending the principle that Contracts & sound policy are for nothing can be more so sound policy than to allow men to get rid of their property in this way - the farmer may be worth ten times the amount of the mortgage.

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It does not mean that mortgages are *ex bono* policy - but that it is *ex bono* policy to allow a man property to be swept from him for part of its value. On this ground *Chy* will extend the day of payment.

Courts of Law do the same in many cases - as if a lender B 1000 and the contract is, that the interest shall be paid annually & if the interest is not paid annually, then the interest shall bear interest. Such a contract is not usurious - nor is there any want of Equity in it - for the obligor will get no more if he gets interest upon the interest, than if the obligor comes at the end of the year & pays him the interest according to the contract. But still if he sues upon the contract, he will recover no more than the simple interest - for Courts of Law consider it *ex bono* policy that more be allowed - and so say a Court of Chancery.

Now a *Pl.* of *Chy* will carry into effect those principles of justice & equity which are adopted in *Ch.* of Law - but which are ^{in those} not extended to those cases that in a *crumbling* degree vary from the letter of precedents tho in spirit they are the same. 30 B.C. 429. 1100 374. 1000 1. 2 B.C. 208. 227. 343. 378. 435. 2 M.K. - 237. 1000 22. 1000 (1st Edition) 264. 1000. 2nd 978.

I have now noticed the first & second observations which I conceived was incorrect. I shall now proceed to the examination of the third, which you will recollect was that "cases of fraud accident & trusts were peculiarly cognisable in Chancery."

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This observation appears to convey the idea that fraud was always cognizable in Chy. and further, that perhaps it was cognizable nowhere else. But this is not true. "Fraud" in a variety of cases is cognizable in a Ct. of Law, & in some cases exclusively so. Fraud in all personal Contracts is cognizable in a Ct. of Law - not in ^{or contract} avoiding, in all cases, but in giving damages in these cases a Ct. of Chy. will not interfere. But where there is fraud in a Real Contract, Cts. of Law stop short of redress, & here it is that Cts. of Chy. afford a specific relief. For the proposition is untrue. Cases of fraud are conversant in both Courts.

So "accidents" are cognizable in both Cts. As e.g. suppose a man should lose a note or other obligation, he may bring his action at Law, stating that fact, and if he can make it appear he will recover - So if by accident a mistake is made in footing up an account, & an obligation given for the amount, either party, that is he, or when a mistake is made & a sum the same & Cts. of Law will render judgment for as much as it is to have, but provided no accident of this kind had happened. So there are many cases where by accident the performance of a condition becomes impossible, in such case a Ct. of Law will not enforce the Contract, as of A. & B. give Bond for the appearance of B. at the next session of the Ct. & before that time arrives, B. dies, now A. is discharged at Law for his bond.

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It is true that much of the business of a Ct. of Chy is relation to "trusts" - the reason is, they afford specific relief. In all cases of trusts they have power to compel a performance of the trust - e.g. A. conveys a farm of land to B. & C. in trust for D. Now if D. has the legal title to this land but is trustee for A. & C. the Ct. will compel him to perform the trust specifically. But it is not true, that a Ct. of Chy has no cognizance of trusts - as e.g. in all cases of bailment which is a trust that has cognizance - as if A. bails to B. a horse, & B. abuses the trust, etc. remedy is in Chy. - So in cases of money lent or advanced, the lender is a trustee of the money; he is to get it back, & the remedy to get it out of his hands, is by an action at Law. So there is no trust in the proposition. The only difficulty is, that Cts. of Law do not go to the extent which in the opinion of the Ct. of Chy the principles will warrant.

As to the position that Cts. of Chy are not bound by any precedents, it is altogether false - they adhere as scrupulously, & are as much bound by precedents as Cts. of Law. Were this not the case, instead of finding our Chy Cts. a place where Equity ~~was~~ is to be obtained according to the principles of Law & justice, they would be instruments of oppression, deciding causes according to the whim & caprice of the Chancellor. But this is entirely false. 3 T.R. 147. P. 160-287. 548. 595. 3 Atk 177. 544. 5 Com. di. 74. 2 H. Bl. 262. 1 Wils 16. 1 Atk 500. 2 P. W.

640. 580. 2 Vern 239. 316. 3 Atk 520. Mitford 4. notes. (P. 2. 691. 30. 2. 181. 1 P. W. 403. 2. 404. 31. 203. 3 H. 289. 120. 314. 2 H. 357. 1 H. Ch. 341. 1 H. 1108. 14. 2 H. 1. 77. 415. 409. P. W. 112. 321. 2 P. W. 642.

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After having made these observations, it brings me to what is alleged to be an essential difference between the two Courts. It is this they differ in the mode of trial, in the mode of proof, & in the mode of relief. I do not mean that when the proofs are made, that they differ in the application of the principles. The same principles, when the fact is ascertained, govern both Courts. The mode of proving the fact differs. The ultimate effect of it is the same. ^{They may, at a party's option, call the deeds &c. of Law.} 31 Dec. 1812. 2 B. 10. 125. 2 B. 10. 126. 437. 104. 2 B. 10. 127.

As also, as to the mode of trial they differ. e.g. if A. B. & C. make a contract to convey his land to D. E. by the first of January and does not - now he may either go to a Ct. of Law & they will give him damages - or he may apply to a Ct. of Ch. & they will compel a specific performance. Suppose the Contract was one which could not be enforced in Law (as if it was a contract to convey real property by parol which by 7th Stat. of Richard 2^d requires to be in writing) - now will a Ct. of Ch. enforce this Contract? No for it is not a contract which is recognized in Law. It is a general principle that if the Contract is of such a nature that you cannot have any remedy at Law they will not interfere & grant a specific performance. 31 Dec. 1812. 2 B. 10. 127.

As to the mode of relief too they differ. e.g. if they have no authority to issue an execution. Then they do not compel a performance of their decree. It is by imposing such a penalty upon the person as will induce him to perform the decree. But suppose

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the man is a Bankrupt, & cares nothing about the property, what will be done? The Ch. has in such cases assumed the power of creating the title in the person to whom it belongs. They certainly ought to have this power else their business might in many instances become ineffectual. But this has been questioned - and on this account Statutes have been made in some of the States vesting them with this power.

SECT. 1st. March 4th 1813.

I shall observe to you as I proceed all the cases where Chs. of Chy apply the principles of the Law, where Chs. of Law have refused. and there are many principles to be learned which will require a careful attention. The great difference between the Chs of Law & Equity consists, ~~as~~ ^{as} you yesterday in the mode of proof, of trial & of relief.

A Rule. Courts of Chy very often refuse to carry a Contract into execution, which they do not rescind if application had been made. e.g. the Contract may be particularly hard on one of the parties, yet if there is no fraud in it, the Ct of Chy will neither decree a specific performance nor will they rescind the Contract. So if there is a waste of money in the Contract, Chs of Chy ~~will~~ will not interfere at all. - They will leave the parties to their remedy at Law. Again -

The maxim that a Ct. of Chy will not interfere, when there is an adequate remedy at Law, seems to be opposed by certain cases in which they do interfere.

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E.g. Suppose A by misapprehension is compelled to enter into a contract he has not seen an adequate remedy. But a lot of cases will arise in such cases. I called upon me & will see used the contract - but they will interfere only on the ground that possibly it will never have an opportunity to take an advantage of the drafts. The contract so obtained by drafts is in the hands of B. the obligee - he refuses to sue it, upon it, in case he knows of he does sue it it will be proved the contract was obtained by drafts. & then there is great danger that the witnesses will be out of the way before B. will sue him, as by death &c. and thus being unable to prove the nature of the contract he will be compelled to pay it. In such case an application to Chancery will be used. They do no more than a Pl. of Ass. &c. &c. of law but as opportunities. So too in case of a mortgage. The condition of the mortgage is, that if A will pay B. 100£ by the first of Jan'y then the land shall be void otherwise the title is in B. Now on the day it goes & pays the money in the presence of C. D. & E. and B. then refuses to give up the mortgage deed, or recovering the same. Now what now is right depend upon? It depends altogether upon the parole testimony of C. D. & E. that he paid the money at the time - It is true if B. is in possession of the deed it may bring an action of quiet title & he can immediately & prove his title by the payment of the mortgage, but if he himself is in possession, the Reg. of the

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title being in B. & the evidence of his equitable interest depending upon several witnesses he can get no relief except in Chy & they will grant it. If B. is giving a foreclosure on the mortgage, the evidence ~~might~~ might, at that time be all in law but this he refers me to do. A is waiting for the witnesses of A's payment to be out of the way and then intends to sue the mortgage & the legal & equitable title will appear to be in him or at least it will be compelled to pay the money over again.

Now for the mode of relief. I mentioned yesterday that Chy did not usually interfere in carrying into execution personal contracts, for in such there is an adequate remedy at Law. Likewise mentions that the mode of carrying the decrees of Chy into effect was by a penalty. Now this penalty cannot be chartered down - if the decree is not obeyed a recovery of the whole penalty will be had. At Law this power of decreeing specific executions of a contract exists nowhere the only remedy was in damages according to Statute 406. This power is not exercised by Chy merely because no relief can be had at Law - for a remedy may be had at Law but it may be inadequate.

It is a general rule that a contract which is entitled to be enforced in equity must have all the requisites which would entitle the party to a recovery at Law. This is not however an universal rule.

No Statute has ever been made giving relief to Chy this power of granting specific relief - Courts

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of Chancery were undoubtedly established to abate the rigor of Common law. Courts of Law were bound by great strictness - the minds of the judges were confined to certain established rules & precedents, & they did not feel themselves authorized to extend these rules to any case unless it fell within the letter of former precedents, tho it might within the spirit of them. on this account there was often times a failure of justice. The King as *paterfamilias* had a power to decide causes according to his own ideas of right & justice as it appeared between the parties, without any regard to general justice. It was impossible for him to sit personally in all such cases as were submitted to him; he therefore delegated his authority to another who was the keeper of the King's conscience, or the Chancellor as he was sometimes called. This was the foundation of Cts. of Chy. & out of it has grown a most admirable system of jurisprudence. Cts. of Law remonstrated vs the power assumed by Cts. of Chy to grant specific relief - but the discontent is now all done away - and their authority to do so unquestioned, governed only by certain rules, which do not violate the established rules of Law. *Latib. 172. 2 Pon C. 4. 5. 6. 1 Roll ab. 354. 368. 1 Fords 27. 2 Pon C. 14.*

The common case therefore of contracts entered into respecting real property are governed by the rule, that if it be a good contract in Law on which damages may be recovered, it is a good contract in Chy to be carried into specific execution. But if a plaintiff

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damages, may be recovered at Law & Ch. but Ch. is a refusal to interfere. But let them apply to a Court of Law.

But there are some Contracts which Courts of Law will carry into execution, when Ch. & Law will refuse their aid. e.g. marriage agreements, entered into before coverture will be enforced in Ch. Why not in Law? Is it because the marriage agreement is not a valid one? No, for the Contract is good at the time it is made - the parties to it were capable of contracting. But the reason is that the wife cannot maintain an action vs her Husband at Law. It seems then that the Contract is not obligatory and were it not for y^e reason that the wife cannot sue the Husband at Law & vice versa it might be enforced. The Contract is not itself void. Suppose the intended Husband executes a bond to the intended wife to leave her \$1000 at his death - now it is said this Contract is terminated by the marriage, because all the wife's choses in action come into the power of the husband on the marriage. This is true if he reduces them to possession - but if he does not reduce them, they will survive to her. Suppose J. S. before he contracted the Coverture of Susan Roe executes to her a note for 1000 not in consideration of marriage, and before the payment of the note they intermarry, now J. S. will be discharged from this note. But in case of Contracts on Consideration of marriage, it is absurd to suppose they are discharged by the happening of that which formed the consideration - viz, the

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marriage. The decisions have been that when the debt is
contracted during the Husband's life and she may recover
it. Therefore when he contracts to pay her 1000th of his
death, she may sue the Executor at Law and will re-
cover it. The contract is then all the while good, but
during the life of the Husband there is an impediment
to her recovering at Law upon it, which has its founda-
tion in the maxim that husband & wife are both
one. Well what will a Ct. of Chy do? They will take
certain liberties, refused by Cts. of Law, which so far
from interfering, that the object of them is to enforce
the principles of Law. They will allow her to file
her bill in Chy vs the Husband and will decree spe-
cific performances of the contract. Now as there is
nothing better settled than that such contract, if
correct, is good. So it is firmly established that Chy
will enforce specific performance of the contract,
tho not executed. 2 Vern 480. 1 Bou. C. 444. 2 Atk. 255.
1 Forb 137. 89. 93. 2 P. Wms 243. 2 Atk 97. 11 Bou. C. 316.

There is a proposition laid down by the most
eminent writers like this. "that when there appears to be an
agreement in substance between Husband & Wife
before marriage, tho it be void at Law, yet Chy
will carry it into execution after marriage." Now
this is not true. What is the case put to exempli-
fy this? It is when the intended wife before marriage
executes a deed to the intended husband to convey to
her her lands after marriage; now Chy will enforce
this contract & so they ought. But the contract is ^{not}

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and at Law. The Law allows of such contracts, tho they will not suffer the husband to sue the wife during coverture. The very point intended by the Court is brought about, i.e. the marriage, and shew that the ~~contract~~ intention of the parties to defeat by the act of marriage? No, you can go to Ch., and they will compel her to perform her contract specifically. But it is said this decree will do no good for the 'Ct. cannot impose a penalty upon her, this is true - but they will vest the title in the husband, which when other means fail to enforce obedience to their decrees, is the dernier resort of a Ct. of Ch. If it had been the husband who was to comply to the wife, they would have imposed a penalty upon him. 2 Pown. 17. 2 Vern. 157. 2 P. Wms. 243.

I will now mention a case where I am unable to discover the reason why a Ct. of Law refuse their aid. e.g. J. S. and T. N. are joint obligors in a bond, & each are to pay one half - when the bond becomes due, J. S. goes and voluntarily pays the whole. Now it strikes the mind at once, that J. S. may sue T. N. to recover one half of the amount of the bond, at Law. But the constant practice is to go to Ch. The origin of this practice I have could discover, & I see no reason why a suit would not lie at Law - for J. S. has done no more than his duty in going & paying up the bond on its becoming due. About 40 years ago, we tried the experiment, i.e. a suit was tried at Law for the recovery of the one half. We have

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never discovered as practical difficulty, in this matter
and I presume there is no technical reason used.
To be sure Chy. do not interfere upon any of the prin-
ciples of Law by relieving. 2 Bl. R. 447. 1 Bouv. 315.
2 Wils. 371. 3 T. R. 428. 3 Bac. 701. 8 Cr. 166. 7 Wils. 164.

It is an agreed principle in all cases that if
the obligor calls the money out of one by a suit
he may compel the other by a suit to pay his propo-
tion - but that if A. goes voluntarily & pays the
amount of the bond, he has a remedy at Law only by
an application in Chy. But there is no remedy
at Law or in Chy if A. and B. are joint tortfeasors
& one is compelled to pay all the damages, as e.g.
Suppose A. and B. are jointly guilty of a battery on
C. Now C. sues both of them, but finds it more con-
venient to take the whole damages out of A. Now
we would think that B. ought to bear his propo-
tion of the damages as he was equally guilty. But
there is no remedy at Law. He will leave them to set
the thing according to their own notions of honor
will can a Ct. of Chy afford A. any relief. It has been
contended they can - so they may, if the Ct. of Chy. can
decide contrary to all principles of Law - But they
are obliged to refuse because the principles of Law
deny their aid.

Rule. If the person contracting, or the sub-
ject matter of the contract be within the jurisdic-
tion of the Ct. of Chy. the Ct. has Cognizance of the
Contract. As if A. living in Lon. contracts to convey

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a tract of land lying in Conn. to B. who lives in New York the Ch. of Chy. in Conn. has cognizance of the case. But if the person contracting, & all the subjects of the contract be within the jurisdiction of the Ch. the decree can only be in personam. 2 Penn. Ch. S. 4. 2 Penn 494. 10 Cr. 204. 44 N. H. 31. 1. 44 N. H. 31. 1. 44 N. H. 31. 1.

To the rule that where a Ch. of Chancery gives damages on an agreement to convey land, Chy will do a specific performance, there is one important exception. Chy will not decree a specific performance so as to effect the interests of a bona fide purchaser or without notice. To explain what I would. A enters into articles of agreement to convey land to B. by which B. has the equitable & not the legal title. A finds he can get a better bargain & conveys the land to C. who knew nothing of the previous agreement between A. & B. - Now B. can go to a Ch. of Chancery & they will give him damages - but can he get a decree for a specific performance vs. A.? - The objection is this, that such decree will do no good, for it has become impossible for A. to perform the contract with B. he having conveyed the land to C. - Now this is just the thing. - Chy will put a penalty upon A. which will be sufficient to cover all the damage he has sustained. and at the same time the rights of C. will not be infringed, as the title is good in him. - But say you, does not this contradict the rule that Chy will not compel a performance of a contract which has become impossible to be performed? No.

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in that rule goes on the ground that the impossibility of performance has not arisen from any fault in the obligor. i.e. Suppose A. covenants to convey blackacre to B. and before the time of performance arrives it turns out that C. has a good title to 10 acres of that land. Now will A. & C. be compelled A. to convey blackacre including this 10 acres to which he has no title? No. they will leave B. to his remedy at Law. A. has been guilty of no fault. he had no idea but that at the time he contracted to convey this land he was the owner of the whole. If A. had known that C. had a title to the 10 acres a specific performance would have been decreed. & so in the other case, if B. had known that A. or C. had entered into agreements respecting the land a decree might have been had as to both A. & C.

A Rule. A contract is entered into, but which is drawn so that the intention of the parties may easily be collected, but on account of some formal defect in the draft of the instrument an action cannot be maintained upon it at Law. in court of Ch. will carry this into execution. But there was a rule that a Court of Ch. would give no relief in a case where a Ct. of Law w^d not give damages. But this depends on another principle which is that the Ct. of Ch. have a power to correct such errors as are in the execution of the instrument or place the contract on the same footing as which it stood when it was first made. i.e. be found was voidable in equity. And when application is

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is made to them to correct the error they having the con-
tract in their possession will immediately proceed to
direct its execution. E.g. Suppose the Surveyor writes
the D^r & S^c to contain only 30 acres of land when accord-
ing to the lines &c. given it should have contained 60 acres.
Now application may be made to Chy to correct this er-
ror. When this is done they will pass themselves the words
of altering the D^r & S^c to tally with the parcel
contract & secure the performance immediately. There
is here no violation of the principle this unless it be
that of letting in parol testimony to control a deed
which will be considered by & by. 9 P. W. 343. 1 S. Ray.
515. 2 Bos. & P. 14 to 17. 284.

I have noticed to you the rule that a Ct. of
Chy will not decree specific performance of a contract
when an adequate remedy can be had at Law. and
for this reason it is that Cts of Chy do so usually
interfere in personal contracts. it is not because they
cannot give redress. If A. contracts with B. to deliver
him 100 Bushels of Wheat & engages to perform, there
is a sufficient remedy at Law. Cts. of Chy do not wish
to encroach their authority, when a Law is sufficient
remedy is offered. But furnish them with a case where
there is not an adequate remedy to be obtained at Law &
Chy will relieve. As if A. buys a horse of B. for a
particular service, as for a carriage, & gives a bill
for 300^l for him. & B. recommends the horse as good
& it turns out that the horse is worthless &c. Now Chy
will not interfere in this contract. if there is nothing
more.

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about it, but will leave B to recover his damage at Law. But suppose A. is a Bankrupt, & not with a great so that if B. sues him, he can recover nothing - and A. is in possession of B's note. Now a Ct. of Chy will allow him to file his bill, stating these facts & they will then give him a judgment to offset B's note, whenever it shall sue upon it. The (A) has a right to recover on the note & as for the time it is in the consideration & were it not for the judgment in favor of B. in the Ct. of Chy which he can offset to the note, he would be a great loser on account of the bankruptcy of A. In such case Chy will interfere for the remedy at Law is not adequate, and so they will do in all other cases where it is necessary. See C. 215. Chy C 34. 1 Wms 447. 1 P. Wms 541. 2 A. 305. 2 Atk 383. 2 Pw. 487.

There is one thing for which I can see no reason. It is a rule that the rights of the parties to obtain redress in Chy shall be enforced at, altho one of them may have an adequate remedy at Law. E.g. A. contracts to sell his Land to B. for 5000^ls. B. refuses to pay it. Now A. may go into Chy & get a decree vs B. to pay the 5000^ls. altho he would recover the same sum in a suit at Law. But why allow him to go to Chy? There is no reason for it, except that B. has a right to go there & procure a decree vs A. to convey the right. must be reciprocal. We done this in 1807. 2 Pw 214.

again - when a party obtains a decree for a specific performance in his favor, he must either have performed his part before he applies, or else it

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submit to be put under a penalty to perform. e.g. A. agrees to convey Black-acre to B. to pay 5000 £ now if B. gets a decree is it to perform the contract specifically. he must have paid the 5000 £ or submit to have a penalty put upon him. - this stands upon the point that he who goes into a Ct. to obtain equity must be self-doing. 1 W. 273 & 3. 2 Pow 5. 6. 17.

This subject is very important - perhaps there is no branch of the Law so fruitful in new cases but there are certain first principles, which once well understood will enable you to determine in your own mind with but little exertion, whether such new case comes within the equity of a Ct. of Chy. - If you are but superficially acquainted with these principles you will doubtless be oftentimes perplexed - they will tend rather to confuse than to assist you in your practice. Sec^r 3^d May 5th 1813.

I have observed that it was a general rule that Cts. of Chy. did not interfere in personal contracts when there was an adequate remedy at Law. But there is one species of Contract on which they will always decree a specific performance - this is a contract to transfer Stock. - here a Ct. of Chy. will compel a specific transfer. The reason is, that these contracts are always made for speculation - the purchaser buys because he thinks the stock will rise in value & the seller sells, because he thinks they will fall. The purchaser is not therefore to be cut off in his expectations of a future profit by the obligor himself. & the

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See, too, post. under "Mortgage" & "Ziphanograph"

were compelled to seek his remedy in a C. of Common Law, he is recover only the amount the Stock were worth at the time the contract became due. Now this rule of C. L. is not the real damage he has sustained, for the stock may have arisen in value after the time of performance has elapsed. For this reason it is that they will enforce a specific performance of the contract. This may be considered an exception to the rule for in other cases a remedy can be had only in the C. of Common Law. 2 Dougl. 217, 232. 10 M. & W. 294. 13 M. & W. 408. 14 M. & W. 231.

Sometimes a man cannot perform a contract he has entered into, because it has become unlawful between the time of the execution & the time of performance - or it has perhaps become impossible by the act of God - in such case he is discharged. But if in such case the contract can in part be performed & the other party is willing to take up with such partial performance, the Court will decree it. E.g. There was a time in Eng^d in which it was customary to make long leases of land for certain purposes. A man to be mischievous, & a Stat. was made enacting that no person should lease land for a longer term than 40 years. Previous to the Stat. A. T. had contracted with B. to lease him a piece of land for 70 years. But before the lease was made the above Stat. was made. A. T. contended he was discharged from his contract to make it, and become unlawful & his agent, B. But B. was willing to take up with a lease for 40 years & this Stat. could not make any more he should

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It is when the person becomes incapable by the act of God as if by A. contracts with B. to lease him his House and home lot - & before the time of performance the House is burned by lightning or swept in a tempest - now if B. is willing to take up with a lease of the same site it will be compelled in Chancery to do so. This principle runs thro all cases. If you have paid money & the performance of the contract has become impracticable or impossible by the act of God, you can recover it back as being paid with out consideration. 11 Bro. 207, 2 W. 254, 1 Bos. 443. 2 Bro. 8, 36, 11 Con. 284.

If the contract appears to be so framed that the obligor is to have his election either to perform the contract or pay money, they will not decree specific performance. This rule applies to all ordinary cases except to penalties, concerning which I shall hereafter lay down the doctrine at length. 2 Bro. 341, 1 P. W. 530.

I have now come to a subject ^{about} which shells of Law & Equity differ. e.g. Suppose a man gives an estate by deed or will to J. S. for life remainder over to his heirs - what estate has he? Every one unacquainted with technical rules, will say that J. S. had an estate for life, & that the remainder over was an estate in fee simple to his heirs. But this is not the case. The word "heirs" is not designative persons - it denotes the quantity of estate. J. S. has heirs as estate in fee. Now there never was any "fee" but

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that an estate given to A. & the heirs of his body is an estate in fee simple. Why then should the words in the conveyance which are inserted in the conveyance alter the nature of the estate. In the case of *Shelley* it is decided that the words are superfluous. But the rule is now unvarying that if an estate is given to a man for life & the heirs of his body, it is an estate in fee simple. If the words "for life" were allowed to have any effect, it would make the estate an estate in fee tail. But the rule of Law is as established in the case above. Now suppose a man is about to marry, & covenants to settle black acre on himself for life and remainder over to the issue of that marriage in fee. Will a set of bills settle this estate according to the wish of the man? No, they will compel a conveyance in words which will actually settle the remainder on those heirs. They will compel the conveyance to be so made that the land will descend exactly as an estate tail does descend, first to the eldest son & his issue, then to the 2^d son & his issue & so on thro the list of male heirs. & on failure of those to eldest daughter &c. This is carrying the Court into effect precisely according to the intention of the parties. This is one of those cases where the Law has not allowed the force of technical to overpower the intention, ^{for the Law} if it is departing from the rules of Law it is to be considered as an exception to the general rule. But I will show you that Cts. of Chy have not contradicted the principle established in the *Shelley* case.

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nor any other principle of Law. E.g. Suppose a man conveys a farm to A for life & remainder to his heirs as the example first considered. I tell you the principle was established that A has an estate in fee. Now what says Chy. to such a case. Why Chy. says that A has an estate in fee. They decide in exact conformity to the principle established in such case. But there is no rule of Law which says that when a man covenants to convey property to A for life remainder to his heirs that A has an estate in fee simple. Therefore when Chy. settle the estate they will settle according to the intention of the parties & not according to the terms of the Covenant. There cannot be said therefore to be any violation of principle about it, for as respects Covenants to convey there is no principle about it or its. 2 Fow. 41. 12. 105, 123. 2 Fow. 349. 1 Fow. 347. 2 T. R. 444. 1 Burr. 53.

An important rule. Whatever is agreed to be done Chy. consider it as done at the time of making the Contract. If A. articles to convey Blackacre to B. & the time is fixed for the conveyance, Chy. will consider the property as conveyed if the terms of the Contract are settled. And this is the rule even if one of the parties dies before the time of conveyance. E.g. T. S. articles to convey a farm to S. R. before the time of conveyance arrives T. S. dies. Now the heir of T. S. has the legal title to the land but a C. of Chy. will consider the land as vested in S. R. But suppose T. S. dies before the time of

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performances to whom will the land belong? Why to the
heir of T. S. The land is considered in Chy as belonging
to T. S. Suppose in such case T. S. has agreed to pay
\$5000 to S. S. for the land, & before the time of conveyance
S. S. dies. This money will belong to his personal repre-
sentative. It is considered the same as if the
money had been paid down at the time the contract
was made. And if S. S. dies before conveyance T. S.
may go into Chy & compel the heir of S. S. to perform
the contract of his ancestor specifically. So in all
cases you can put. if you find the contract of sale
is a nature that a Ct. of Chy can carry it into spe-
cific execution, every consequence of its being per-
formed attaches. Suppose e.g. A. has a Covenant with
S. S. to convey Black acre to him. and when he dies
he wills all his lands tenements & hereditaments
to B. Now this Covenant to convey lands will, pass
under the name of lands tenements & hereditaments
for if the Covenant had been actually performed Black
acre w^d have passed to B. and a Ct. of Chy consider
it as performed. And the purchase money will pass
by a will made by S. S. before it is received & for
the same reason. Chy consider the money as the
actual possession of S. S. the Testator. 1 P. W. 56.
1. 4th 572. 2 P. W. 56. 02. 77. 232. 11 Mod 468. 1 H. Bl. 413. 359.

You see why consider S. S. who has contracted
convey this land (at supra) as having no beneficial
interest at all. He has the legal title but is no
Trustee for it the Covenantor merely. But this rule

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however is not to operate so as to shelter himself in any case. If the Government holds the title deeds, conveys the same to a bona fide purchaser. The title will rest in the purchaser & he will hold the land, e.g. A. conveys to B. by deed & does not pay the consideration of the sale, or some accident the title deeds are not delivered over to B. A. then sells the same land to C. for a bona fide consideration. Now C. will hold the land and B. & A. Government must look to the Government for the repayment of the money. And in all such cases, it is a rule that when a person has the legal title & the possession of property, tho' in fact he may be merely a trustee for another, if he sells to a bona fide purchaser, he is ignorant of the trust the purchaser will hold it. The reason is, the last purchaser has the legal title & equal equity with the Government; his claim therefore is superior. But in a case where A. has the legal title & not equal equity with B. - he will hold it. - on this ground stands the taking of mortgages. - A. mortgages his land, first to B. then to C. & then to D. Now these persons have all equal equity. But B. will not have the land for he, besides having equal equity, has the legal title. Now if D. goes & pays the sum due to B. he will have the legal title, & will have the land. he has now united the superior rights of B. with his equal equity - the priority of title is now therefore in D. 2 Vin C. 60. 40. 3 Atk 291. 1 Fon 339. 1 P. Wms. 279 282. 429. 2 Com. ins 338.

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It is a rule that if a contract is originally fair & equal, the subsequently it has become unequal yet this will enforce it. And it makes no difference what the bargain was. If it was a bargain at hazard which was mutual at the time it was made, it will be enforced in Chancery. e. g. A conveys or agrees to convey Black acre to B. provided B. will settle upon him an annuity of 1000^l for life. Now this is a fair bargain of hazard. If A should die in a week B would make a great bargain if he should chance to live 20 years he will lose. Now Chancery will compel specific execution of such contract if A should die the next day - the not one cent has been paid nor accrued. But if there is a previous act to be performed by one party, & it is not performed, Chancery will not compel a performance of the contract on the other side. As if A. living in Delaware made contracts with B. living in Ohio that if he B. will execute to him a deed of a farm of Land in Ohio & lodge the same with the Town Clerk of the town where the land lies, & when he A. will give him (B.) a deed of his A's farm in Delaware. and it turns out that before B. executes the deed, the same land is swallowed up in an earthquake, A will not be compelled to perform the contract on his part, for the condition of B. which was precedent remains unperformed. This is a rule of strict Equity. 2 Bro. Parl. Cas. 415. Pre Chancery 135. 2 Poult. 132. 83. 112. 236. 240. 1860. 483. 3. 105. 221. 1. Ford 413. 418. 1200 236. 883.

Suppose the agreement above to have been entered
in 10

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into is denied in fact, what is to be done? This has no power to try the fact. The practice of the Eng^t Chy Courts & most of them in the U. S. is to send that case in the form of an issue to the Cts. of C.D. there to be tried by a jury, and as they find it so the Chancellor will decide. The Chancellor will not undertake the decision of a question of fact. Out of complaisance to the judges of the C.D. court where the issue is sent the usual practice is to request their opinion upon the Ver. But this is not necessary. 2 Pow 216.

In Court we do not send the issue to a Ct of Law. It is decided in the Ct. of Chy. The Ct however appoint a Committee of 3 persons to assist in ascertaining the fact. This may be said to be in violation of the C.D. rule, but there is one advantage attending our method over that of the Eng^t practice.

It is that the Ct appoints such persons as a Committee who are well acquainted with the nature of the controversy, if it respects mercantile concerns they will appoint merchants if it is respecting agriculture or mechanics, those acquainted with that profession will be appointed. &c. whereas Jurors are often times wholly ignorant of the nature of the business out of which an intricate question may arise and are for them to decide. 2 Pow 216. [I apprehend the force of the Judges reasoning in favor of the good old Court, sometimes entirely ceases when applied to the other States in the Union, for ignorance is not ^{there} so conspicuous a trait in the character of the common people as in Court.]

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Sept 4th May 6th 1813.

I have already observed that Chancery does a specific execution of a contract when they would not rescind it. These are cases when there is something said or unreasonable in the contract, & yet not sufficient unfairness to authorize them to rescind it. They will leave the parties to their remedy at Law. As if it was a contract to convey Land to B. for half its value, and B. should apply to Chy for a specific performance or in any other case where there is a great inadequacy in the consideration, Chy will refuse to decree a performance or to rescind the contract either. This is a matter about which they exercise their discretion, and it is not uncommon for them to do so in such cases on the presumption that there is some unfairness. 1 P. W. 571. 2 To. 385. 3 Atk 353. 2 P. W. 43. 225. 1 Bro Chy 226. 2 Vern 12. 72.

The contract must not only be a fair one but there must also appear to be a good degree of mutuality, else Chy will not decree specific performance. So also if the contract be voluntary tho under seal, yet the Ct. will not decree specific performance, for the damages at Law will be nominal. And it is a rule that the damages would be recovered at Law yet if these damages are nominal a Court of Chancery will ^{refuse} to decree any performance at all. 2 P. W. 221. 1 Vern 7. 450. 1 Atk 10. 2 P. W. 251. 256 & 341. 1 P. W. 341.

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It is a rule in Chy that when they rescind a contract they will do perfect justice between the parties. However it may be bad policy to allow men to lay themselves under heavy penalties for the performance of a contract, yet Chy will relieve only as a penalty & the debt & interest is to be paid, & the duty engaged in the contract to be done, must be performed. So in the case I have before mentioned, when young Huss sold their real estate, Chy will rescind the contract on no other ground than that Mr. M. was paid for such appearance & paid back again. A Ct. of Law would do otherwise if they acknowledged the contract to be of sound policy, they would declare it void & the money the heir had received he would be allowed to retain. But the rule in Chy is, as above. I will now mention some

Cases in which Cts. of Chy. will rescind a contract.

Chy will sometimes rescind a contract, where there was no fraud, no duress, no any unfairness in it. These are cases where the contract has originated from mistakes - it turns out to be different from the expectation of the parties. In rescinding these contracts there is no rule of Law violated - for it is a rule of Law that when the consideration of a contract fails, the money paid may be recovered back. A Court of Law goes no further with the principle than this. But Cts. of Chy. take it to cases of evident mistake. Now suppose a note & bill for £1000 to a large amount with sundry endorsements, & in casting up the balance

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due a mistake is made & it pays \$500 000 more
now this money may be recovered back at law.
But suppose it is paid to B. a died of a lot in Indiana
Ohio, & it turns out that it had never a lot belonging
to him in that country, & there was no fraud on the
part of A. but merely a mistake. Now a lot of C. may
well rescind this contract. Suppose the mistake
is with respect to a thing which was the sine qua
non of the contract, i.e. without which the contract
would never have been entered into at all. & C. may
rescind the contract. A. is e.g. the owner of a tract
of land in the western part of the State of N. York,
and on this land it is supposed there is a fall spring.
Nokes wishing to set up the mill works contracts
for the land merely on account of the spring. It
is discovered, & the surveyors being the spring just
upon the line of A. & B. Nokes brings suit to rescind
that the surveyors made a mistake & the spring
is just off the line in favor of A. & A. is in that case.
Now it is evident the minds of the parties have never
run upon this contract; the sine qua non has
failed & C. may rescind it.

But will a court of equity rescind a contract in
all cases of mistake? No they will not. If the mis-
take is of a trifling nature they will leave the
party to his remedy at law. For e.g. if A. is selling a
jack of land on account of a few "unprofitable"
he asks 600 more than the otherwise value. & B. pays
it & it turns out that there were no ~~unprofitable~~ ^{unprofitable} in it.

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land, but on D's. now a C. of the will no account of this mistake rescind the contract. All the damage is not over to D. & C. he has paid 400 more than he would if he had not supposed those trees were on the land he was buying, & so he will recover back at Law. Now C. first part of the volume under the head of "Error in Contract" in 1st margin. - 100. 147. 4

100. 147. 4 mentions this case. A wishing to buy a servant boy applied to D. and D. told him a person which he supposed was a boy, as he had not owned her long, but had always supposed to be a boy, he was dressed in boys clothes. He turned out that it was a girl. Now this was a clear mistake, and according to the Civil Law the contract would be utterly void. But will Chy rescind such contract? I think this a doubtful point. There is no reason which would prevent them except that it is a personal contract. Chy would not hesitate to rescind a real contract under such circumstances.

The rule then is that, in real contracts, a C. of Chy will rescind, if there is a mistake. But it is said that the C. will not rescind if the mistake is a mistake in Law. This is often laid down by Elementary writers, & the ground on which they attempt to support the position is, that all men are presumed to know the Law. It is true that in the Civil Law was "ignorantia ^{leg.} non excusat" and in ordinary cases, the maxim is applicable to

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own own system of jurisprudence, & enforced by our Courts. So that if in an indictment for a criminal man sh^d plead his ignorance of the Law it would not avail him. But if a man acts under a mistaken idea of his rights, Ch. will always relieve him. There is a case of this kind. There were three brothers, and the middle one died and a dispute arose between the other two as to which of them sh^d inherit the father's estate. The youngest urged the principles of justice in his own favor, said they were sons of the same parent & therefore entitled to equal shares of the estate. To this the eldest would not consent. They finally agreed to leave the Qu. & a Schoolmaster in the neighborhood, who they said knew every thing. The learned arbitrator when the Qu. was submitted to him, referred to the "Lampy's Companion" (a Book of forms) as an authority to make up his decision. After ^{much} mature reflection as the great importance of the case required he gave it as his opinion "that the youngest brother was entitled to the whole estate, because, he said, it was a principle in Law, that landed estate descended but never was it thought they ascended." On this the eldest brother settled with the younger & they divided the estate equally between them. Now here was a mistake as to the Law, for there is no principle better established in England than that the eldest son inherits all the real estate of the father & his estate, yet all of this was properly decided the Court in the end.

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ground that it was entered into under a mistaken idea of those rights with which he and Sam had vested. This case is cited on Power & has never been contradicted.

So when C. by decree compelled B. to enter into a bond to pay him \$1000 and afterwards A. induced B. to take up this bond & gave him another. B. having no idea but he had got the bond to pay entirely voluntarily into the 2^d bond. Now this is a principle of Law that if the 2^d bond is entered into, not under duress, but in consideration of having the first one which was obtained by duress destroyed, there may be a recovery on this 2^d bond at Law. It is a good bond. He was entered into voluntarily. But what says the Ct. of Chy? They will rescind this 2^d bond. Why? Because it was entered into under a mistaken idea of the party's rights. Had he supposed the first bond was void, & no recovery could ever be had upon it, he never would have entered into this subsequent bond.

But when it found B. in bed with his wife & told him unless he would give him a bond for 5000 he would make the matter public which would prevent him from being in Law a Equite, & he executed the bond. The Ct. of Chy refused to set it aside. There are other cases, where both Sam & A. are misapprehended in these the Ct. will rescind. The proposition then, that a Ct. of Chy will not rescind a contract entered into under a mistaken idea of the Law is incorrect. 13 Am. 32. 100. 120. 126. 400.

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I have already stated that Ch. of Chy. interfere
with the execution of contracts in all cases of fraud. It
seems strange why a contract, on breach of which should
be left to rest a moment at law. Whether the fraud
is in the execution or in the consideration. But so it
is, & the party in the last case is left to seek his
remedy in damages. And it is said that because
a Ch. of Chy. will not set aside a contract, where there
is fraud in the consideration they ~~are~~ are governed
by a different principle than that which governs
a Court of law. The truth is, a Ch. of Chy. knows
nothing of fraud in the consideration, they have no
other principle about it than that they will not
leave the party a recovery of damages, but say
they the contract is void if the fraud is in the
execution. Now all a Ch. of Chy. have done is to
extend this principle of law to cases of fraud in
consideration. They conceive the party is as much
entitled to be relieved from the contract in one, as
in the other case. E.g. A. wishing to purchase a horse,
for no other purpose than to ride. B. offers it to him and
recommends him to do so and he purchases it for
200£. Now it turns out that the
horse has some latent defect which he has not dis-
covered by A. at the time of purchase. Now had they
known of this, would they have purchased it?
What is the result if it is found that the
horse is defective? They interfere in the first place

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what did A pay for the horse? Why he paid 200^l. What
what was he worth? Why was a saddle horse, the object
which A had in view at the time of the purchase he
was not worth anything, but as a horse to labor
on a farm he was worth 400^l. A B. and C. did not
this 400^l from the 200^l and give her 1600^l damages. But
this is not correct for A has no use for a farm
horse, to him the horse is entirely worthless. Now I
say the Ct. of Law ought to declare the contract as
void also give the party the 200^l which is his
damages. And I believe the time is approaching
when this principle will be found to govern both
Courts of Law & Equity.

In another case where A (an ignorant person)
agreed to pay a sum of barley for the first
mow in the horse's mow, & two mows for the second
& so on doubling at each successive mow and for
this the horse was to be his. On being sued on the
contract the Court enquired into the value of the
horse & made him pay that. Now here was a
deviation from justice. They ought to have declared
the contract void, because B. had taken an
undue advantage of the ignorance of A. A had
no idea but he would get the horse by paying
half a peck of barley & B. would not have sold
him for the amount fixed by the Ct. as his value.
They decided contrary to the intention of the parties, & the
Ct. of Ch. Cognizance over such personal contracts
I have said it would. 2 Powl 170. 222. 224. 261.

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There is one kind of Revers to which I allude which will not interfere. This is what is called *Revers of Fraud*. There is a case of this kind. I was living in the family of B. who (B.) was fast failing in health. He was a man of large property and I by persuasion induced him to believe that his (B's) wife and children were wishing him dead and gone, so that they could get the management of the property. B. in his death made his will & willed all his property both real & personal to A and his family without a Cent. Sometime afterwards C. and D. who knew of the means A had made use of to get into the affections of B. & procure a will in his own favor, went to B. & told him that A had reported about the Country, that he (B.) was a drunkard lying at home, and he (A) wished him (B.) dead as he was then to inherit all the estate. Now this story of C. & D. was wholly false, so much so that A had always spoken in the highest terms of B. However it had this effect. B. executed another will & devised all his property to his wife & children, & afterwards died. A endeavored to set aside this last will, & establish the one in his favor, on the ground that this last was procured by false & malicious story of C. and D. but the Court of Chancery refused him any assistance on the ground of its being a *fraud per se*. By the fraud of C. & D. he was deprived of that which he would have wished to deprive the wife & children & the Court refused to interfere. 2 P. W. 251. Smith's case. 16. 220.

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I have before mentioned that I was not allowed
for Chy to interfere in personal contracts, on the ground
that adequate remedy is afforded at Law. But when this
reason ceases & the remedy becomes inadequate, Chy will
interfere as the case I mentioned above. I had cheated
W. in the sale of a horse & I was bankrupt. & he had
obligation on his hands. but Chy would give him
judgment to offset wth that note. But in order to do
this, it is necessary the contract be liquidated, i.e.
reduced to a bond note or other instrument. If the
contract exists in parol, & there is no written evi-
dence of it, Chy will not interfere.

It is said that inadequacy of price will not
be sufficient to induce a Ct. of Chy to set aside a
contract. But Lord Thurlow says the inadequacy
of price as such, will not be sufficient to set aside
a contract, yet, it will furnish evidence of some
other reason, which will be sufficient to authorize
them to do it. e.g. if J. S. conveys his farm to T. A.
which is worth 10,000^l to T. A. for 1000^l it furnishes
evidence that T. A. was either drunk or crazy, or
that the deed was procured by duress, and Chy will
set aside the contract. I know it is s^d. that Chy set
it aside on the ground of hardship - but from what
does the hardship arise? from the inadequacy of the
price - so that in reality, this is the reason. Chy not the
one assigned. 2 Bos 176. 1 Bos 29. 1 Atk 17. 1 Tonn 62. 3 P. 10.
130 or 150. 2 Bos 176. if not here look for inadequacy in the
law, & you will find it. -

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Courts of Law know of no such principle as that of setting aside contracts. They sometimes declare contracts void but the principle of Equity & Justice which governs C. of Ch. in setting aside a contract is not adopted in C. of Law. You are a fair contract they will not order the money paid to be paid back again. Now suppose A gets drunk & makes an unfair contract with B. so much so that it is greatly cheated. Now a C. of Law, thro policy, will carry this contract into effect. I know of no cases where the Law has refused to carry a contract into effect on account of the drunkenness of C. at the time he contracted, unless the person with whom he contracted got him drunk for the purpose of cheating him. But still I can see no reason why the contract should not be considered void, or set aside, even if it was himself the means of his being drunk - for it is an established principle that you shall not take an undue advantage of another's situation to get a contract out of him. He may be as incapable of contracting as if he were a perfect lunatic & I believe if the case were to come up before a C. of Ch. they would set aside the contract.

There is one species of fraud of which I have not yet treated - and that is fraud upon 3rd persons. Now it was never apprehended but that a contract entered into between A & B which operated as a fraud on C was valid and the practice was to go to a C. of Law & they uniformly set them aside. But will

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not the Contract be considered as void at Law? The
practice has of late obtained in Eng. for Chs. of Law
to refuse to carry such Contracts into execution.
e.g. J. & Susan Stokes are about to be married,
and the Father of Susan agrees to settle 10,000[£] on J.
daughter provided the Father of J. will settle as
much on the Son. To this the father of J. agrees but
there is a secret covenant entered into between the
father & the Son, that he (the Son) will receive only 5,000[£].
The father of the daughter makes the settlement & the
marriage takes place. Now this Covenant is ultra
leg. void, because it is a fraud upon Mr Stokes, &
Mr J. Stokes will be compelled to make a settlement
of 10,000[£] according to his agreement. On this princi-
ple also, is this case. A was failing in his circum-
stances, & his Creditors agreed if he would transfer
all his property over to them, they would take
in full satisfaction of their debts, & give him new
said it & set him up again. Some of the Creditors
refused & told A that unless he would execute a note
a note of hand for 600[£] he would not sign. A, ac-
known to the other Creditors entered into the Contract.
He afterwards signed him on the note, and A. plead
the fraud, & the Ch. of Law declared it void, on the
ground of its being a fraud on the other Creditors.
2 Pow C.C. 1000 475. 2 Vern 764.

Contracts entered into thro fear & not
dupes, will be rescinded in Chs. They go on the princi-
ple that a Contract obtained by fear is substantially
void.

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substantially the same as those obtained by duress.
As the case, where a young gentleman, then young,
losing a rich wife, spent to the mother a release
of all the rents & profits she had received of her
daughter's estate. It was set aside in Chy. on this
case in 18. 20. & 18. 20. 639. 1 Bro Chy 369. 2 Poul. 160. 157. 264.
3 P. Wms 248.

In examining these cases, you will find
there is a certain kind of fear which will not
avail him. E.g. A. having been in Trade for some
time had acquired a property of considerable value.
His Father suggested to him the propriety of his
consenting that his (the Father's) property should
be settled on the other children, and A. out of mere
entire fear to the father entered into a contract
which cut him off from receiving any of the
man's estate. and the father died intestate. Had it not
been for this contract which A. had entered into, he
as eldest son would have inherited the estate, and
he applied to Chy for relief from that contract
on the ground of its being entered into thro fear.
But the Ct refused relief on the ground that this
was not such fear as could be considered to be
entire to a legal duress, & such it must be.

It is a maxim of Law which applies in all
cases that Contracts, or some policy will be treated
as void. As where two Englishmen, but upon the coast
of a battle between Eng. & France it was held to be
a sound policy that one might induce one to give

information to the enemy, so where a wager was laid
as to the result of the Cavalry &c. Co. it was considered
as void, as it sound policy, & also conflicting with
equity with the feelings of a third person. But you
recollect that lots of such steps show in two or three
all cases. 1st where young ladies sell their expec-
tancies, & also in case of marriage brokerage bonds.
These are clearly not sound policy but lots of law refuse
to consider them so. but they will set them aside. and
in doing so they violate no principles of Law 39 Hen.
131. 2 Hen 346. 2 Act 34. 1 Geo. 350.

Sept 5th May 7th 1813.

Courts of Chy. have also affirmed the power of re-
cusing usurious contracts. The ground on which they
rely is that these contracts are distinct from that in other
cases. Now an usurious contract is void at law.
if the usury can be proved. now if Chy. proceeded upon
the same principle as a Ct. of law, as they do in com-
mon law, they would rescind this contract. But
they only strike out the usurious part of the contract.
It executes a bond to B. in which is contained 10 £
usury. Now a Ct. of Law would declare this bond
void in toto, & no recovery of any part of it is
allowed. But if application is made to a Ct.
of Chy for relief to this bond they will only strike
out the 10 £ usury & order the rest to be paid, i.e. the
debt & simple interest. Now it is said Chy do not
proceed upon the same principle as a Ct. of Law.
True. but as far as they do go, they proceed upon

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the same principle & further than this there are restrained by their own rule which is that they will do perfect justice between the parties. It cannot be said that justice requires the instrument sh^d. to be void in toto. Chy decide upon the ground that it is unconscientious that a man sh^d. receive more than legal interest, but it is not unconscientious that he should receive his just debt & legal interest. They will therefore rescind the contract so far as it can be said to be corrupt and live up to their established principle of doing perfect justice between the parties.

But if this is all Chy will do, why is application ever made to them. Why does not the party take advantage of the usury at Law, when the whole bond will be set aside & he discharged from the payment of any part of it? I have never seen but two reasons for applying to Chy. The first is & under which almost all the cases are tried that the party cannot prove the usury at Law and therefore the bond will not be voided. But what advantage has he in proving the usury when application is made to a Ct. of Chy? He has this advantage, that in a Ct. of Chy application may be made to the Dfts. own conscience. As respects testimony, it cannot be denied but that Ct. of Law & Equity materially differ. Chy will put a party upon his oath, & compel him to testify. This is a principle of which Ct. of Law are wholly ignorant. There

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are however some restrictions upon this rule of
Chancery. If by the party's own testimony he may be
subjected to a penalty, you are not at liberty to
apply to his conscience e.g. if the case is that
there has been too much interest received you
cannot put the debt upon his oath, for by his
confession of the fact, he subjects himself to a
penalty. It is true however that if the penalty
is going to the poff. & not to the public, nor to a
third person he may be compelled to testify.
Suppose after being put upon his oath, he refuses
to testify, or suppose he refuses to be put under
oath at all, in either case the bill will be
taken as confessed.

The other reason which has induced men
to apply to a Ct. of Ch. rather than to a Ct. of Com.
to get relieved from usury, is this. the person would
not lay himself under so great a temptation to do
injustice as he would be under if the bond was
declared entirely void. He can prove the usury
by the supposition. e.g. A executed a bond to B. for
100£ & in it were contained 10% usury & this he could
prove - but he feared that if the bond were wholly
declared void, as it would be if he took advantage
of it at law that he would be laid under a tempta-
tion not to pay B what was really his just
due. He wished only to get rid of the usurious
part of the bond, and he chooses rather to make
application to a Ct. of Ch. who will relieve him

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him from the usury, & at the same time compel him
to pay the debt by paying what in good conscience
he ought to pay. Instances of such sumptuous hon-
esty are rare, but such cases are to be found. These
are all the only grounds on which application to
a Ct. of Ch. is ever made. 1. 450. 2. 450. 3. 450.

There was once a case in Ch. whether we
could apply to a Ct. of Ch. in case of usury or not?
The grounds on which the bill was filed was that we have
a Stat. in Court putting it in the power of a plff.
in all cases when the debt is due to us. to
bring to call upon the conscience of the Dft. and then
the Ct. of Ch. proceed exactly as a Ct. of Ch. The
Stat. also provides that judgment shall be rendered
for the plff. after expunging both legal & usurious
interest. A case of this kind arose. A bill was filed
which contained nothing but interest & part
of which was usurious. Now according to the Stat.
the Ct. were obliged to render judgment for the plff.
for the amount of the obligation after striking out
all the interest, but in this case if they struck out
all the interest, they could not render judgment for
the plff. for after doing this there would be nothing
left on which to render judgment. They therefore
gave him nominal damages & his costs. This
was not in strictness entitled over to him as
damages but it was necessary to give him this in
order that he might recover his costs. Since this, it
has been well settled that application may be made
to Ch.

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Let all now proceed to notice to you the grounds
on which the Ct. of Chy. are interfered in the

of Unlawful Contracts.

Contracts to do an unlawful act, or when the
consideration of them is illegal are void. This is settled
perfectly settled. and if application is made to the
Ct. of Chy. they will set them aside. But the manner in
which they proceeded to do this has given rise to some
controversy. In a Ct. of Law the contract was to be
proved to be illegal by a species of evidence of a high
nature as that of the contract itself. But in a
Ct. of Chy. parol proof of its illegality was admitted
and was held to be sufficient evidence to authorize
them to set it aside. It was contended that Chy.
by admitting this parol proof & invalidating a con-
tract which was sealed or written, had established
a principle of evidence which was in direct vio-
lation of the one established by the C. of Law. The
maxim of the C. of Law was, that by parol testimo-
ny you could not remove to the Court, the considera-
tion of a contract which was written or sealed.
and on this maxim was built the idea & principle
for which the C. of Law contended. But the Ct. of Chy.
so construed the maxim that it did not in the least
stand in the way of their proceeding as they did.
They considered that by it was only meant that you
could not introduce parol testimony to prove
there was no consideration in a written or sealed
contract, but said you might prove the illegality

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of such contract by parol evidence. Now what is the ground on which parol testimony is excluded from proving there was no consideration in a written or sealed contract? It is not on the ground of the danger of its introduction; but it is on the ground, that the law will not suffer him to contradict that by parol, which upon the solemnity of his hand writing, or a seal, he has confessed. e.g. He has entered into a note in these words "for value received" &c. or he has put his hand & seal to an obligation, thereby expressly in the one case, and impliedly in the other, confessing that he has entered into the contract with a consideration. Now were a party allowed to prove there was no consideration he would at the same time prove himself a liar. On this ground it is that parol testimony to prove there was no consideration is very properly excluded. But altho the party confesses that there was a consideration, & will not be allowed to prove there was none, yet he by no means confesses that that consideration was a legal one; he is so. therefore be allowed to prove its illegality by parol. This is the ground on which the Ct. of Chy proceeded, and altho it was for a long time a source of contention between the two Courts, yet the Ct. of Mass at length acknowledged the correctness of the rule of construction, which the Ct. of Chy gave to the legal maxim, as respects parol testimony, and adopted the same in their own Courts. so that now the illegality

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If a contract may be proved by parol as well as by deed, as a matter of course, you may then enquire, where is the necessity of applying to a Ct. of Chy in any case? There is no necessity for it except in a case of this kind. It may have entered into a contract with D. & the consideration of it be illegal. D. refuses to sue, but notes the contract, & says, "I will not sue, but I will note the contract, & if it is illegal, I will not sue." A. is aware of the illegality, & D. is aware of it, & there is no doubt at what time the contract will be enforced. Now in such cases, it may apply to Chy & Chy will always relieve him. 2 Wils 347. [See, suppose the obligor confesses a consideration in the contract & also confesses its legality, will it preclude him from moving by parol that it was illegal? No, for he may spread the consideration on the record, & the Court will judge whether it is legal or not.] -

The rule then is now established both in Law & Equity, that where a contract is entered into to do an unlawful act, or where there is an illegal consideration, parol testimony may be taken to prove it - the not to prove there was no consideration in such contract. Now it is said that there is no reconciling all the cases, that there have been cases established & enforced in this, that the consideration was unlawful. But a case is not to be found in the books where the contract was executory, & the consideration of it illegal, where they have enforced it. There may be cases where the unlawful act has been performed, & a consideration

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Chancery also through a writ of habeas corpus
into a writ of certiorari has been allowed to inquire
by a C. of Chy. e.g. if it executes a bond to B. for
1000 in consideration that he will do an unlawful
act the bond is utterly void both in law & equity.
But if having done that unlawful act it engages
to pay 1000, the bond has been in such case enforced
in Chy. and on examining the cases you will find
this is the distinction - e.g. Formerly all bonds given
to keep mistresses were void. If given after the
separation of the parties they were good or bad
according to the character of the woman - if it
was given as promissum pudicitiae they were good
& might be enforced if given to a common strumpet
but they were void. Now C. of Chy. always main-
tains that there was no reason for saying the
bond was void in either case, and in either case
they would enforce payment - He was a com-
mon law lawyer & paid in consideration of past services.
That it was a bond given in consideration of
future debauchery it would not have enforced.
Courts of law have now adopted the same prin-
ciple, & Common Strumpets & seduced women are
not upon the same footing & both are entitled
a recovery of the bond at law, i.e. if given for
past services. The principle is absolute in all
other like cases & on this ground C. of Chy.
have always decided - 2 Wils 339. 1 Wils
291. 3 Wils 150. 2 B. 167. 172.

Prover of Chancery.

I have observed that Chy will not enforce agreements which are merely voluntary, & tho. they are under hand & seal. There is an exception to this rule in case of marriage settlements made after marriage. Settlements made before marriage in consideration thereof, are not voluntary within the meaning of the term marriage is as good as y^e cash. But settlements made after marriage are voluntary. How are these settlements to be made? The husband cannot convey directly to the wife, he must convey to T. P. in trust for the wife, & T. P. will convey to the wife herself. Suppose then A. contracts with T. P. to convey to him black acre in trust for Susan, his wife. Now Chy will compel specific performance of the contract. Not however to the prejudice of creditors, for in such case the maxim is, a man must be honest before he is beneficent. The ground on which Cts of Chy proceed in such case, is that it is the duty of the Husband in the first place to make a disposition of his property so as to support the wife. Other considerations frequently come in aid of this, as that the husband received a large property by the wife or the wife has had a fortune of personal property descend to her since marriage & the husband has never made a settlement upon her &c. On these grounds it is perfect justice that he should be compelled to perform his contract, that is, if by doing so, the rights of creditors will not be injured.

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You will find some cases where Chs. J. Chy have refused their aid - as e.g. where the contract has been of many years standing, without any demand of payment, in the meantime, or any agreement between the parties postponing the day of performance - in such case Chy will refuse to interfere on the presumption that it has been settled between the parties. There is no precise rule which can be laid down upon this subject. Chy must use their discretion & will afford relief or deny it according to the nature & circumstances of the particular case. 2. Pow. 2. 268.

There is a species of Contracts, which Chy will enforce, tho it has been said that they are pointed up by the Stat. of Frauds & Perjuries, and that Chy, in decreeing performance have gone precisely contrary to the principles established in Chs. of Law. That Chs. of Law were blown in coming into the land pursuant to law there is no doubt. but I do not believe there is now an iota of difference between the two Courts in this particular. Those contracts out of the Stat. or out of Law, as in Chs. are those in which they will decree a specific performance, an action may be maintained at Law. Courts of Chy have nothing to do but with one branch of the Stat. of Frauds & perjuries, which is, that Contracts for the sale of land, tenements or hereditaments, may interfere with or concerning them must be in writing, and cannot be enforced. now have not Chs. of Law enforced

Deeds of Chancery.

many contracts included in the Statute, though they were not in writing? yet will in doing this, do they not go against the Statute? I will explain the grounds, on which this power which will furnish an answer to this question. - A Co. of Chy will deliver those contracts & be void which will be so considered in a court of law, if there is nothing more in the case - e.g. if A contracts by parol to convey Black acre to B. Chy will not enforce performance & so A is discharged. But A goes for a breach of the contract. What then are the cases? This are those. A makes a parol contract with B. A has derived an advantage from the contract & then attempts to set it aside by pleading the Statute. Chy will enforce it. Suppose A agrees to lease Black acre to B. for 10 years. & the contract is that B. is to build upon the land a house and 4000000 stone walls. By accident the house is not made out - & tho' B goes upon the land & performs his part of the contract according to agreement. He then requests a release & A refuses. He applies to Chy to compel a specific performance of the contract and it pleases the Statute of Straits & perjuries. But Chy will compel him to give release - on the ground that A. is endeavoring by his parol contract & fraudulent intention, to procure an advantage to himself - thus say you may make use of the Statute to shield you, in gain but we will prevent your using it as an offensive weapon. But why do not carry this Contract into execution, because it is a good Contract... but because

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Sept 18th. Nov 5th 1813.

Chancery also exercises the power of relieving us
of Penalties.

The Law on the subject of penalties was originally that if men entered into contracts & then there was a penalty to the performance of the contract, there was no remedy at Law, on the ground that C.B. were not at liberty to make or bring money to alter the nature of a contract. Penalties were not only annexed to contracts for the payment of money, but also to contracts to do a collateral act, as to build a house &c. Courts of Chy took up the subject & decided these contracts were of sound policy & they set them aside, tho they did not operate upon them any farther than to do perfect justice between the parties. They would then reduce the penalty to the real damage sustained by the breach of the contract & for this decree a payment. Therefore if A enters into a contract with a penalty of 1000 £ to deliver B 100 Bushels of wheat Chy would enquire the value of wheat at the time the contract was to be performed. They would then reduce the ^{penalty} contract to this amount & for it decree payment. Formerly at Law the whole penalty would be recovered. The manner in which Cts. of Chy took upon themselves the liberty to interfere in case of penalties was this. In the reign of Hen. VIII. Sir Thomas Moore who was then the Chancellor called all the Judges of the C.B. Courts together, & requested them to render judgment for the exact debt & interest when

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a contract with a penalty was sued before them. But they had so long been in the habit of giving damages to the whole amount of the Penalty, that they refused to comply with the request. The Chancellor then took an oath, & he not in the habit of swearing that if they would not give a remedy he would - and even after an application he would charge the penalty so as to do exact justice between the parties.

A Stat. was afterwards made giving Cts. of Law power to charge penalties of a certain description, so that in these there was no necessity to resort to a C. of Chy for relief. yet many kinds of penalties were left out of the Stat. when therefore a case of this latter kind occurred application to Chy would always ensure relief so far as justice required. This Stat. I believe has been copied in every State in the United States. Those cases included in the Statute which gave Cts. of Law power to charge were, first where a bond was entered into for the payment of a certain sum of money, with a penalty annexed and second where a man entered into a Covenant to do a certain act, & also gave a bond with a penalty to insure the performance of the Covenant. In neither of these cases, Cts. of Law were authorized to charge the penalty down to the real damage the party had sustained by the nonperformance of the contract. The principle has however been extended, & other cases of penalties have been decided to come within the spirit tho' not within the letter of the Statute. as e.g. Cts. of Law after charging

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bonds, entered into for the party's appearing at Court. So when he enters into a covenant to do a certain thing with a penalty as in the 1st & many other instances where the penalty is as a bond policy. The ground on which they consider it as a bond policy is, that the property of a man is thereby swept away from him without his receiving any compensation - & it is giving the obligee in the bond much greater damage than he has sustained which is unjust. But on what principle is it that when a man is bound over by a magistrate to the superior Court, for the crime of burglary (e.g.) he be made to give the bond? There is no ground nor reason in it. The Legislature may choose then for it is given to them or what is the same thing to the Treasurer of the State. But these bonds are not at all within the policy of the Law & ought not to be chancery or Court.

But it is not in all cases that where a sum of money is to be forfeited on the nonperformance of a contract that the Court will interfere. The distinction is this if the penalty annexed appears to be in the nature of a ^{proportioned} damages for the nonperformance, they will not interfere but if it is entered into with a view to enforce the contract, & is merely a penalty then it is a penalty & will be set aside. E.g. Suppose a man enters into a contract to lease his land for 10^{/-} per acre. and it is further covenanted between the parties that if B. the lessee should plough up a certain meadow containing 5 acres, & plant it, that for those 5 acres

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he should pay 20th p. acre - this is not a penalty. It is the damage, agreed between the parties, that it will occasion to the time it that meadow is ploughed, such a contract would be enforced. But suppose the contract was, that if the lessee ploughed up those 5 acres he should pay the lessor 100th p. acre - this is a penalty & the Ct will enquire & ascertain the actual damage sustained by the ploughing of the 5 acres of meadow & then set the contract down to that sum. It plainly appears that this 100th is not intended by the parties to be the damage, but is entered into only to secure a performance of the contract. So if A builds a house & B or C agrees that if he does not return the house by the first of Jan'y. he will pay it 85. besides the hire - this is the damage of the detention of the house over that time, agreed by the parties. This will not set it aside - but if it had been to pay 100th on failure to return house as above, it would have been considered a penalty, & then set down to the actual damage sustained. Again. Suppose A contracts with B to sell another gallon of Brandy in S. C. with a penalty of 20,000th. Now it is perfectly plain that this is a penalty - a security, that he will not sell - but suppose he agrees to three pence for every gallon he sells this is evidently agreed for damages, & will be received. It may in some cases be difficult to ascertain whether it is a penalty - or agreed damages - but by considering the intention with the nature of the contract you can generally determine one. 2d Bou 209. 2d Bou 216. 2d Bou 3d Atk 520. 4th Atk 112.

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Now in case a man covenants to do a thing
under which Cl. of Chy. has cognizance so that cove-
nant becomes a penalty, the covenantee has his elect-
ion to bring an action at law for the penalty or to
file his bill in Chancery for a specific performance.
But if he applies to Chy. he must waive the pen-
alty. e.g. A covenants to convey Black acre to B, for
\$20,000 now he may sue at law for the penalty, which
will be then run down to the least damage sustain-
ed by the breach of the contract, or he may waive
the penalty & apply to Chy. for a specific performance.
2 Vern 60. 2 P. W. C. 206. 100.

There is frequently a covenant entitling
to have money by installments, with a penalty im-
posed that if on the installments are not regularly
paid, the penalty shall be forfeited. e.g. A entitles
a covenant to pay 100\$ by the first of June, also
pay 100\$ by the first of July, & 100\$ by the first of Au-
gust - to this is affixed a penalty of 1000\$ to be paid
on the failure of either of the payments according
to the terms of the contract. Suppose he fails to pay
the first installment, what is the course to be
pursued? Why he must sue the penalty which will be
run down to 100\$ & amount with all due & Chy.
costs. Suppose then he fails to pay the second instal-
ment, how is it to get a remedy for on the first instal-
ment was obtained on the bill of the Cl.? Why he must
recede on the judgment, & the penalty stand as secu-
rity for the payment, & will again be run down.

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to the amount of the installment at that time due together with the legal costs & so on totis expensis. 2 Dow C. 19. 214. 2 C. 110. 517. 2 Ves. 52. 1 Sid. 442. 1 Bac 544.

If a bond has been given for the performance of covenants & now go to Chy to recover the penalty the manner in which the Eng^l Chy proceeds is this - they send the d^u. in the form of an office to the Cts. of Com^o there to be tried by a jury who assess the damage occasioned by the breach, & to this the Ct. of Chy will attach the bond. e.g. put the case of a covenant not to sell brandy with a penalty of \$20.00⁰⁰ - now if the covenantor goes to Chy to recover the penalty, they will send the d^u as to how much the covenantor has sold, & the damage the covenantor has sustained thereby, & thus the Ct. of Chy will order to be paid to him. It was very wrong purpose for the covenantor has sold but one gallon, and the damage to the covenantor not 10 cents, yet he will recover his costs - and so he may proceed as often as a breach happens. 2 Vern. 119.

I have already a number of times hinted at a subject which I will now consider at length. it is that

Mortgages.

The ground on which Cts. of Chy grant relief is here as in other Cts. s. v. it is no sound policy. But is a mortgage no sound policy? No. but the effect of it is - a mortgagee has power to B. for it which is worth 10000⁰⁰ now if the money is not paid by the time specified in the deed it is all lost, yet for ever

Rivers of Chancery.

Courts of Chy consider it as vs. sound policy, & will therefore lay their hands upon it. But will they not, & will the contract be conditionally & not they do not set aside the contract at all. all they do is, to give the mortgagor a further time to pay the money. the rights of the mortgagor are not injured. they will compel the payment of the money, with the legal interest & costs of suit. The ground is this. Chy decide the contract at an end, so soon as y^e money is paid. Suppose the money has been paid who has the legal title? Why the mortgagor, & Chy will consider the mortgagor as a trustee for the mortgagee, & will compel him to perform the trust by reconveying to the mortgagee. It frequently happens that the condition cannot be performed by the time, but if the money is afterwards paid together with the interest & cost, that is all to which the mortgagor is in justice entitled. and it is a rule that if the person is a naked trustee, whether in a real or personal contract, having no equitable nor beneficial title, Chy will compel a conveyance. Sometimes a man applies to Chy to redeem his land before he has paid the money. This is not allowable, if he knows what he has got to pay; but many times he cannot know for the mortgagee has been in possession, & has received all the rents & profits for many years, which is all to be deducted. now it is uncertain what the amount due will be, and application to Chy, now

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be made. Chy. will settle it, & make such decision as justice & the rights of the Parties may require. A mortgage is therefore altogether an equitable estate in the mortgagor - This however is not known in a Ct. of Law. It is a creature of Chy.

Upon the same principle it is that when a man gives a bond for compound interest so named Chy. will relieve vs. it - that is they will enforce the compound interest & render judgment for the full & legal interest. There is no usury, nor compulsion in the bond, but a principle of policy slips in and induces the Ct. of Chy. to relieve vs. it.

You recollect I mentioned to you that Chy. would decree specific performance of a contract for the transfer of stock. This has always been the case - But of late I have seen a "decree" inserted in some case, thereby intimating that it was questionable - I do not find whether it has been decided tho it is said that it has been decided in 10 Ves. Jr. 161. that a Ct. of Chy. will not execute such contract specifically. 8 Ves. Jr. 159.

Under this proposition that a Ct. of Chy. has power to compel a Trustee to do his duty, I shall notice several things. e.g. Suppose a man who is to devise lands to A. as a trustee for the payment of his debts legacies &c. and he executes the trust but does not perform it - now a Ct. of Chy. will compel him to sell the lands, by laying him under a penalty. By the way! Some of a man dies intestate

Power of Conveyance.

his real property goes to his heir, & his personal to the administrator for the payment of his debts. Now suppose A dies & leaves a B as executor to pay his debts, then he means to secure himself against, properly, from doing this. & B does not sell the l. of Chy then say him under a penalty to sell and he makes sale of the land for more than the amount of debts, to whom does the surplus go? It will go to the heir - i.e. if he is a named trustee, as in the above case, it goes to the same person or persons to whom it would have gone, provided there had been no devise. 1 P. Wms 522. 2 Ss. 171. 3 Ss. 211.

1 Bro. Chy. 542. 1 Vern 47. 2 Ss. 677. 3 Atk. 254. 1 Sal. 154.

What if the trustee refuses to accept of the Trust, is the devise void? No. but Chy will appoint some other person to perform on his stead.

I will now lay down to you a very important rule in Eng^d. the act so in point in U. S. It is this. whenever money is raised by the intervention of a l. of Chy to pay debts, those debts are to be paid *pari passu*. - that is, there is to be no distinction, no preference between different kinds of contracts. We know that there is a gradation of debts, by the English Law. Bonds & sealed instruments are of a higher nature, & to be paid before simple contract debts. But a l. of Chy knows nothing of any such rule - If you must go to Chy, as in case of a refusal on the part of a trustee to sell - they are all ways considered as equalable assets. e.g. A trustee

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and the Land is sold. now is to make my preference
in the debt? but this is not the case suppose. It is
where the trustee refuses to ~~have~~ pay him to compel
him, in such case it is universally equitable as to
by which I mean the debts are all pari passu. From
this principle of Chy. we derived our doctrine of dis-
allowing a preference in the payment of debts.

Again. There is A. who has mortgaged his
farm worth 10,000 £ to B. for 1000 £ and it is not
paid. what estate has he? At Law he has no estate
at all - in Chancery he has an Equity of Redemption.
But before he redeems the estate he dies. how are
creditors to obtain their property to pay their debts.
There is no possible way at Law, for such an estate
is not there worth one brags nothing. if they could
get any thing, it must be obtained by going into Chy.
petitioning the Ct. that they will compel Peter Giles
the heir of A. to redeem the land. If the petition is
granted they now bring in a bill for this purpose, and
if Peter refuses to redeem, the land is then sold under
an order from the Ct. of Chy. at public auction. Now
then is the money to be divided among the creditors
according to the rank which the several debtors hold
at Law? At Chy. says, you were obliged
to come to us to obtain a relief, & we know nothing
of the doctrine of a preference of debts. therefore it
shall be sold pari passu. The Specialties are
in justice no more entitled to payment than the
Simple Contract debts. C. 113

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Of Marshalling Assets.

Courts of Chy also assume the Power of Marshalling the assets. e.g. A. B. dies and leaves real & personal property. Now according to the Eng^t. Law; the specialty contracts are to be paid first. We'll suppose the amount of personal property amounts to 5000 £ & the specialty debts exhaust this fund & are satisfying themselves. So that there is no personal property remaining to satisfy the simple contracts and by the Eng^t. Law the Real estate is not liable for the payment of simple contracts. now what will be done? Why if application is made to Chy they will decree that the heirs shall pay these debts out of the Real Estate. for say they, you were liable to pay the specialty contracts, but those creditors chose to collect their debts out of the Executor, therefore you shall pay the debts of the simple contract creditors. for if the specialty contracts had been paid out of the Real estate as might have been done, then the personal property would have remained to satisfy the simple contracts.

Lect^r 7th. May 10th 1813.

I was in the close of my last Lecture explaining to you something of the doctrine concerning a power of appointment in Chy of Marshalling the assets. as the subject is important I will repeat what I have before said which will enable me to go more fully into the subject.

By the Laws of Eng^d. there are two funds for the payment of debts - one growing out of the Real & the other out of the personal property. The personal property is liable to pay all debts whether due by specialty

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on by simple contract - & for this purpose the personal property must be in the first place applied: i.e. for the payment of debts. But the Real property is not a fund out of which the payment of simple contracts can by law be taken. It is liable only for those debts which are evidenced by specialties, as deeds &c. Now it often happens that a man dies possessor of a large Real Estate, & but little personal property yet if the bond creditors want to go upon the Real Estate & collect the payment of their debts from that fund, there might be sufficient personal property to satisfy the simple contract creditors. But the bond^{holders} choose rather to collect their debts from the personal property. A Ct. will say therefore that what ever sum the specialty contract creditors look out of the personal property you the heir shall pay to the same amount out of the Real Estate to satisfy the simple contract creditors. you shall pay as much as on your own bond you would be bound to pay, and no more. The heir may still have a large property left & the simple contract creditors lose part of their debts. but Cts. of Equity are restrained from giving them full satisfaction because it is a principle of law that the Real Estate shall not be liable for the payment of simple contracts. Thus, the principle which is an absolute & unreasonable principle & we can easily conceive of a case where great injustice is done to the creditors of the deceased. E.g. A dies possessor of Real Estate to the amount of 50,000 and has no

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personal property, nor specially concerned as his - but he owes by simple contract 10,000. now in such a case they are without remedy either in Law or Equity for his wife has all the estate & then lose their debts. But suppose his Real Estate is worth 30,000 & his personal property 10,000. his debts are by specialty to the amount of 10,000 & his simple contract debts to the amount of 20,000. and the specially creditors take their dues out of the personal property, which exhausts that fund. Now what are the simple contract Creditors to do? Why, on the principle before explained will compel the heir to pay out of the Real Estate how much? Why, just as much as the specially contracted Creditors have been paid out of the personal property. This, in the above case, is 10,000. will then ~~these~~ the simple contract Creditors lose just half of their debts, & the heir is left with an enormous fortune of 40,000. This is very unjust - Parson 2d. Chs. of Chy. restrained by the positive rules of the C. S. I have no doubt but they would afford redress.

Now the heir is under the English Law always entitled to all the Real Estate, provided there is personal property sufficient to pay all the debts - e.g. Suppose A. dies leaving personal property sufficient to satisfy all his Creditors - but B. having a bond to the executor for 5,000 collects the same out of the heir. Now what is the heir to do - in Equity he is not obliged to pay this bond - i.e. the personal property is first liable. He may go to the Exor. & demand payment of as much as

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he himself has paid. and if the Exec. refuses, the wife
compels him. They consider the Exec. as a trustee to
the heir for that amount, & they will compel him
to perform that trust.

OF TRUSTS. Courts of Chancery will also
execute all trusts - and their object is to execute the
trust precisely according to the intention of the person
creating it. Now an Estate may be given to A. in
trust for B. - A has the legal title - and B. all the ben-
eficial interest - Now the Q. is what was the inten-
tion of A. who created this trust - Did he intend that
the Estate should be conveyed to B. at some future
period, or did he intend that A. should always have
the legal title & B. receive the rents & profits of the
Land? e.g. Suppose A. dies & creates a trust in T. & V.
for his son Peter & Alice, who is then a child of 10 years
age. T. & V. is intended by the Father to be the Guardian
of the Child - Now what was the intention of the father
why it was that when Peter came of age, or if he mar-
ried before he was 21. that T. & V. should convey the
legal title to the Custody of the trust, & this will compel
him to do it. The intention is generally conceived to
be, that the trustee is to convey the Land.

But this is not always the case - e.g. Suppose
Peter is a dissipated young man, & this is known to the
father, but he wishes to provide for his son, & his property
is put in trust for him to T. & V. Now when he comes of age
will a Ct. of Ch. compel T. & V. to convey the legal title
to Peter? No - for this will evidently defeat the purpose.

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object of the "trust", which was to place the estate
in the hands of a faithful trustee, which would at
the same time serve to supply the necessities of the
son & also to restrain him in his dissipated career.

Suppose again the marriage was a child, &
then dies. Now this child may go into being and compel
the trustee to convey the legal title for the reasons
offered in the last case entirely ceases. The dissipated
father is dead, & nothing is now reasonable than to
suppose it was the intention of F. that the trust
estate should be conveyed to the heirs of his son, who
was he should die. You will find all the cases to
stand on this one particular circumstance is
you must collect your determination from the sit-
uation of the family & the object intended by creating
the trust. You will see the rule laid down that the
existing trust can compel a conveyance - this
is true if the object of the person creating it was
that it should be conveyed.

There is no such thing as defeating the purpose
of the trust of his title, except the trustee sells the
land to a bona fide purchaser - and this will not al-
ways do it - for if the bona fide purchaser was really
ignorant that the vendor hits the estate as trustee for
another, yet if he had the means of knowing the fact
he will not. Note. e.g. Suppose the estate is situated
in Ditchfield, & the trustee & existing trust also re-
side there, & a stranger comes from N. York & purcha-
ses the land of the trustee, on a bona fide consideration

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will he hold the land? yes for here he was a stranger
that had not the means of knowing the situation of the estate.
But suppose the bona fide purchaser also let die
T.C.B. & it was a matter of public notoriety that
T.C.B. held this estate as trustee for another but
it can be proved he was ignorant of it. Still he will
not hold the land for the means of information have
been sufficient to inform him of the fact. Suppose the
purchaser (who is a stranger) before he purchases, asks
T.C.B. for his title deeds that he may satisfy himself
whether his title is good or not & T.C.B. declines or re-
fuses. and after this he buys. he will not hold the
land vs the existing one trust - for the conduct of T.C.B.
might have awakened a suspicion in the purchaser
that all was not correct or that T.C.B. was ~~the~~ not
the real owner - he ought not to purchase in such case.

Now in Eng. & in many other States in y. U. S.
it is questionable whether the existing one trust can
ever be defeated, for there is a law in this State
as many others compelling the record of all deeds. Now
is the case such that a man is guilty of negligence, un-
less he examines the record to ascertain whether the ven-
dor has the legal title or not? I know that it is said
in Eng. that this constructive evidence, in case of
mortgages, is not sufficient but there it is not cus-
tomary to make records except in four counties. I
think it is very different where it is said the duty of
all persons to record the deeds by the law of the State which
is of universal extent all over the government. This

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The *du* has received a construction by the Superior Ct. in this State. that it is evidence of negligence, & that he will not hold it as the ordinary and trust. Suppose he examines the Records, & finds the Land has been conveyed from A. to B. and from B. to C. & from C. to D. but appears the title is now in D. and he goes to D. & pays a bona fide consideration for it and it turns out that D. had conveyed the Land to E. but that E. had neglected to get his deed recorded. now who will hold? why the subsequent bona fide purchaser, for he has done all in his power to ascertain in whom was the title & it was by E's negligence that he had not the deed recorded.

There are what are called Implied trusts arising out of the circumstances of the particular case - A Ct of Chy will enforce these - one from analogy to the case of constructive revocation of wills they do not consider implied trusts as coming within the operation of the Statute of Frauds & Perjuries. I have had occasion to mention to you, one case of implied trusts where Chy had cognizance over - & that was mortgages. Again - Suppose A furnishes B. with 10,000^{ff} to go into the State of N. York there to purchase a farm for him (A.) - and B. goes upon this errand & purchases the Land, but instead of taking the title to A. he takes it to himself - there is no fraud in his doing so - it is done perhaps because it is more convenient. now he is a trustee for A. But the *du* is can A. ever get him to perform the trust, by conveying

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conveying the Sum over to him? Yes for it is proved that he went as atty. for A. that his business was to purchase the Sum for A. and that A. supplied her with money - from the proof of these facts the Ct. of Ch. will compel him to execute the trust. Again suppose A. has a farm in N York & she sends B. there to make sale of it, & gives him a power of atty. to do so. B. sells the farm & returns with the money. but refuses to pay it over on account of the Stat. of Frauds & Perjuries. but Chy will say from the facts it appears that you (B.) were a trustee for A. - you shall therefore perform the trust. And as to the action of Account would lie for the recovery of the money i.e. when the action is unjust. In Eng. it has gone out of fashion & Chy have generally furnished the remedy in its stead. 2 Pow 255. 12 Wm 356. 24 Wm 17. 285. Forb. 60. 1 Chy R. 286. 2 To. 180. An. 6. 467.

Chy however cannot compel an execution of a Fraudulent Trust, any more than a Ct. of Law e.g. A. conceals his Creditors are coming upon him, & conveys black acre to his friend B. and the agreement is that B. is to convey the same at some future time. He afterwards pays off all his debts & then requires B. to convey the farm but B. refuses now will Chy compel him? No. This is on the ground of policy to deter men from conveying their property beyond the reach of Creditors. There is not a Statute in Chancery to this effect but Chy will not step in to assist. It is too late now of the land.

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Chancery likewise exercises a power of compelling persons to discover testimony. I have before mentioned to you a rule in Chy. which was unknown by Ch. of Can., which is that of applying to the conscience of a party to discover the truth of the case. But it may be that you do not wish to go to Chy. for relief, you may then file a distinct bill to compel a person to come into Chy. & discover such testimony as he is acquainted with. & having procured the testimony it may be used in a Ch. of Can.

It often happens that after you have put in your bill for the discovery of testimony, a Ch. of Chy. will grant a specific relief, wth the vizirally they had no cognizance of the case. The principle on which they do this is that having gotten possession of the cause by this bill being first before them, they will also proceed to do justice between the parties. But this has been a subject of much perplexity to me for I find in other cases when the bill for a discovery of testimony has been filed that they would not grant relief. And what is the line of distinction I never quite ascertain, tho' I have made it the subject of much research. Unable to satisfy myself, I cannot write for you. I give you the naked fact. I have no doubt but there is a line which is known to themselves, tho' it is no where I believe laid down in Books. Now Sir Westminster Hall, I would make the enquiry. —

10 W. 400. 2 Atk 630. 1 Bro 547. 194. 3 Atk 282. 7 W. 526. 1
2 Bro Chy 61. —

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There is a mode of Preserving testimony over which Cts. of Chy. have assumed to possess authority to Courts of Law. It is this. Chy. will issue commissions to take depositions, to be used hereafter, and these are in perpetuum memoriam rei. Courts of Law know no ^{making} ~~thing~~ of a thing of this kind. Which justly gives rise to an observation by an eminent jurist, that the C. is not in all respects perfect. This practice is often of great use - for those witnesses or when a party may rely to obtain justice, may be so dangerously sick &c. Chy. have always had the power of issuing such commissions. It was formerly said that the person petitioning for this commission must state on his petition that there is some extraordinary reason, such as extreme old age, dangerous sickness, for his applying for the issuing of such commission, else the Ct. were not authorized to grant it. But there is, in reality, no necessity for it - for the witness be not sick now, he may be hereafter, and the there is ^{particular} cause of alarm, yet all are mortal, & it is perfectly proper to reduce the testimony to writing. If of the person is going to sea, or going on a journey, his deposition may be taken. When the Commissioners sit for the performance of their duty, they are to notify the adverse party to attend if possible. This cannot always be done, for as in case of dangerous illness, the adverse party lives at a distance.

Courts of Chy. also exercise another power of granting specific relief, altho the subject before them

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not connected with any idea of Real property. But this
is a power to compel a person to deliver up an instru-
ment. E.g. if I give a Bond to B. and I give & pay the
amount. But it is not delivered up. a Ct. of Ch.
will compel obedience to it. They consider the property
of the bond now rests in the obligee.

So if it pays the amount of an execution vs
him, which is not entered on the Excon. but he takes
a receipt for the sum from the officer, & by some means
the original Executoe procures the possession of it, they
will then put him a year or two up. So if the money was
entered on the Excon. they will do the same. for the
inducement is liable to abuse. and it is proper that
after it has been satisfied it should be returned to the
proper officer. So in case of a mortgage which has
been paid. now when the mortgagee gets back his deed,
his title is as good as new, unless it be in Court, or
some other place, where the deed is to be recorded. In
such case as the mortgage deed was recorded, it is
necessary the mortgagee convey the title to the mort-
gagor whenever the money is paid. in the one case
they will compel the mortgagee to return the deed
or in the other to convey the title. 9. Mod 297. 2 Atk-
307. 11 Mod 479. On Sale Instruments.

The time has been, & that within a few years
when no one supposed you could recover on an instru-
ment at law, which was lost. and the only remedy
in such case was supposed to be in Ch. But of late
Cts. of Law have sustained actions on instruments tho

Præcis of Chancery.

they are lost. The reason why Geo. J. Davis formerly re-
fused to sustain an action on an endorsement about was
lost was that they thought the proof must adhere
strictly to the facts of the declaration - when it was stated
in an action on a note that the plaintiff lost the same
and into Geo. J. Davis, he put the same with property and
if he could not produce it he was to fail. But the
whole difficulty in this respect is done away for they
have admitted a declaration in a different form stating
that the note is lost by time & accident instead of
pleading it with property. Geo. J. Davis, he states that
he has made diligent search for it & is unable to find
it, but does not state it is lost, until the bill is put in
the action? I think not - they would presume the note
had some endorsements upon it, or there was some other
reason inducing the plaintiff not to produce it - in Geo. J. Davis
however might give relief because they can apply
to the conscience of the plaintiff. - 3 Atk 17. 10 Ves 392. 2 Atk
13. 10 Bro Chy 218. 3 T.R. 151.

Again, Courts of Chy decree partitions
between joint tenants tenants in common or s^r. Mortg.
in Chy all was imp^d & this kind is usually denied in Chy.
What is the principle on which Ct. of Chy. refuse
jurisdiction over causes of this kind - Can not you apply
to a Ct. of Law & get a partition? Yes. Well perhaps
it is because they are dangerous to society at times? No, for
Cts of Law give a specific remedy. The grounds on
which they, in first place, can not interfere at all, but
pose was th. e.g. A B C & D were tenants in common

Deeds of Chancery.

and the title deeds are in A's possession, & he refuses to make partition and you go to Court to compel him. There is no record of the title deeds, & the Ct. can't compel him to produce them. If you can get any power to search to the contents of the deeds you mean, for it is a principle of the C.S. that when the opposite party has possession of the deeds & will not produce them, parcel evidence & other contents may be admitted. But by the supposition there is no parcel evidence. And that A. & B. will defend the partition for they have no power to compel him to bring them up. Now then apply to Chy. and they will compel A. to produce y^e deeds under forfeiture of a penalty if he does not. I suppose this was the manner in which Cts. of Chy. in the first place got possession of such cases, & the possessor once obtained they have ever since kept it.

But in Lon^d. & in other States where the deeds are recorded, Cts. of Chy. have no cognizance over a case of this kind. Courts of Law afford specific remedy, and application is easily made to the record, in case the Deft. refuses to produce the title deeds.

I have before observed that Cts. of Chy. would rectify mistakes in deeds and other Instruments. This is when the scrivener draws the Instrument differently from the intention of the parties, and evidence may be admitted to prove the parcel contract and the will after the deed is so that it will accord with it. There is one thing to be noticed however. If the scrivener makes use of such words as the parties desire, the

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in legal effect. They may alter the nature of the contract from that intended by the parties, yet Chy will not receive in such cases. e.g. suppose J. & S. d. it. & go to Justice White, to get him to draw a deed. They direct what words he is to insert & he does not follow their direction but inserts others which varies the contract now Chy will rectify this mistake. But suppose he does follow their direction & the words inserted vary the nature of the contract from that intended by the parties, now it is laid down, & I cannot find that is any where contradicted that Chy will not interfere to rectify this mistake, on the ground that it will be according to the directions of the parties. I confess it is perplexing to me to discover where the reason of their refusal is to be found - for altho the terms used are those directed to be inserted, yet their intention is defeated by their ignorance as to the meaning of those terms. Now I should have supposed that Cts. of Chy after getting over the great difficulty in allowing of the admission of parol testimony which was a long time so strenuously opposed by the Cts. of Law, that they would have granted relief in a case of this kind - where it so manifestly does it - Their scrupulous adherence to ~~some~~ the principle that they will carry the intention of the parties into execution - is here manifestly disregarded.

Review of Chancery.

Sat^r 5th. May 11th 1810.

There is a subject over which long and warm passions
have been agitated, property is very important. There
allowing, a wife a separate property from her husband.
It is to be seen nothing is this subject which the marriage
took place, nor has there been a time when women were
supposed to all her property, and her husband the usufruct.
during life of her husband. Property of course she was
deprived of all her property, both real & personal during
her life. But a separate property is a different thing.
The wife has her share of this property, which
immediately protects her separate property, the
husband has not the usufruct. It can never become
his, even at her death. Still no marital rights of the
husband are violated. In fact the wife has as extensive
a control over her separate property as the owner
of property in any case has, and if the husband invades
the right of the wife in this respect she has a remedy
vs him in a l^y. It is true if she makes use of this prop-
erty to assist in the support of the family, she cannot
claim a return of it from the husband. But if
she lends the husband money out of her separate estate
she is entitled to payment as much as the creditor
except that she is preferred, i.e. other creditors have
first. This separate property is sometimes given to a wife
directly, it can come to her in various ways. The mode makes
no difference, for l^y will afford her protection in
all cases. See l^y 275. 2. near 452. 487. 1 R. 11. 264.
3 R. 11. 334.

Rivers of Chancery.

On what principle do they protect this separate property in the wife. The manner in which the first case is often stated is, suppose a husband has property, but he is not for the wife and he having cognizance of all trusts would not allow the land to be the same but to himself. He only answers, with any consideration of the situation, afterwards when the property came to be given to the wife, that the will of the 1st person the husband is, and consider the husband as trustee for her and therefore when any one invaded the rights of the wife as to her separate property she could maintain an action as her in the name of her husband & if the husband invaded her right, she would also have to bring her bill in her own name. The property must be given to her as separate property - the other person must be not necessary, any other which she is interested in the husband's estate.

Again, as to contracts entered into between husband & wife before marriage, or in common cases merged by the marriage, e.g. if J. S. entered into a contract with John Dicks - then married to J. S. is in every case discharged from it. One of the contracts was entered into in consideration of marriage, the marriage took place before the contract. e.g. if J. S. before marriage was creditor of John Dicks, and John Dicks was bound to pay John Dicks 10,000^l at his death. The bond is given & may be recovered

Powers of Marrying.

not Director. Now this case it is stated that contract
entered into in consideration of marriage - but you
but suppose the bond is not given to pay at husband's
and to make a settlement of land upon her
and the marriage now is that void? It is a
good one that is, it is not voided by the marriage
it is manifest from the case just supposed - for if the
bond is a good one why then not this to consider
consequently enforced? The bond is given by the
husband to enforce the marriage and the only reason
why a remedy may not be had after it at law is
that a wife is not permitted by the laws of such
some states to sue her husband. How do they get
along with it? Why they say the bond contains evidence
of an agreement entered into by the husband &
wife, - such agreement will be enforced in equity. They
consider it as amounting to a covenant & on this ground
they will decree specific performance of it. See 12
22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

Articles of agreement between husband & wife to separate will be enforced in equity. These articles
are generally entered into with Trustees, for they can
not contract with each other. He may convey or
assign to a 3^d person for the use of the wife. If he
does & completes a performance of the Trust, and then
never get rid of the contract - he can never release
the property after conveying it to the Trustees for the
wife. But such being a mere voluntary conveyance
and the creditors are not to be injured thereby.

Powers of Chancery.

but the contract is binding to him.

That a husband cannot convey directly to himself is a principle of the C. D. on what ground is the principle established? When it is, in the first place said, that the Husband & wife are both one, therefore if he conveys & dees to her, it is the same as conveying it to himself. That is really true as a fallacy is such reasoning. For if the principle is established that Husband & wife are one & the same person, why is not the conveyance of the trustee to her considered as a conveyance to him? The conveyance then is the first place to the trustee & the trustee to her is nothing & on that a force. but the C. D. principle is well settled & so far. This is however all done away by a Stat. in Eng. which enacts that if the conveyance is made to one in place of another the force of the Stat. by the force of the Statute vests in the use-man and therefore the use vests not a moment in the trustee. By this Stat. the single die will pass property from the H. & W. to the wife. This is called the Stat. of Uses in Eng. It has been copied in some of the States tho not in ours.

There are certain contracts, which Courts of Equity will relieve to, which cannot be affirmed by the parties, and there are others which are in a kind of intermediate position, will not relieve. The distinction is this. If a man enters into a contract, which is utterly void, & if it is at the same time that contract can never be affirmed by the parties, & the obligation is never made it binding upon himself, & if the contract is

Process of Chancery.

Such an one as would a grand assize, it was never to affirm. But in those cases when a contract is entered by deed, & the obligor being fully aware of the rights & obligations, affirms the contract, & by giving a new bond, &c. will be bound by it. 10th. 3d. 4. 11th. 25. 30th. 20th.

Courts will relieve as (as in the case of the) The Sake of Time. This is where a man has been discharged from performing his contract for a time, & is afterwards willing to perform it. Suppose e.g. a man is to pay a sum of money by a certain day, & his estate which has been mortgaged, & a foreclosure, but upon its being foreclosed, & on the road to pay the money he accidentally breaks his leg, in consequence of which the time expires, now will the Court relieve as the Sake of Time.

And I have known them to relieve where there was even some degree of negligence. As where a man had a large sum of money to pay as a foreclosure of mortgage, and he did not about collecting it, till one week before the expiration of the time, tho in all probability this time would have been sufficient provided no accident had happened. He was taken sick on his way going to get the money at the time expired, and they relieve as the Sake of Time.

So in another case, where the mortgagor did not get the money, and the estate was worth much more than the amount in which it was mortgaged, they relieved as it - this was called opening the foreclosure, i.e. giving the mortgagor further time to pay.

Revers of Chancery.

But there is a case where a second application was made
in Court and they opened the foreclosure again but
then told him under a rule of Ct. that he would not ap-
ply again - He however did apply the 3^d time & they
reversed it again. They will be careful however in doing
this to see that the mortgagee be an innocent party. For the
rule is to the in Foreclosure postea.

Of Bills of Peace. They have also taken cog-
nizance of cases where the controversy was so enlarged
that it could not be settled at Law without a multi-
tude of suits. In cases of this kind they have intervened
subject up in one bill & settled it all at once. This case
is called a Bill of Peace. How do they do this. Is there
not an adequate remedy at Law? The ground on which
they proceed is to save the parties cost - the whole ques-
tion may be settled as much to the advantage of both par-
ties as one. William & Co. as at Law where perhaps a very
small sum is lost - See Case 261. & Case 28, 266, 308, 159, 2 & 217.
Unlabeled by a pretty excellent case. Why will not interfere.

Of the assignment of Instruments. 926.2. Bonds
which are securities for money, except mercantile instru-
ments were not negotiable and yet this would protect
the assignment of them - e.g. A. holds a bond of B. and
he assigns the same over to C. Now the bond not being
negotiable, must be given in the name of A. Suppose
after the sale of the bond A. is about to enter a judgment
Now C. will show an information to him, advising him
not to do it. Suppose he disregards the information. Why
will they enjoin the Ct. not to admit it? & return it. To

Powers of Chancery.

the obligor having had notice of the assignment, from the amount over to the assignee, or of his receipt of a release from the obligor, in either of these cases this will preclude the assignment as against the plaintiff's legal right. But these equitable principles are of late years giving ground in Chancery. They do not yet go the full length which they have gone for of the obligor's release from the obligor, though it will arise if the debt has been assigned over to a 3^d person. 2. Eq. 5th. 2d case 340.

9. Heavens. Chancery will sometimes decree the performance of an award. But this is only done when there has been a subsequent agreement to abide by the award. The ground on which they take cognizance of the subsequent agreement - if the award is respecting Real property it is easy to conceive why they should take cognizance of it - for it is then an agreement on which they claim a jurisdiction, but it is not so in the case of Trades & Professions. Would prevent their decreeing specific performance, i.e. if the subsequent agreement to abide was a parol agreement. But the vice does in case of Personal Property - e.g. an Auctioneer's sale. That A sold pay 10000 & then B was to convey, & deliver a parcel of land. It was known to the parties that A's sale was defective & might be set aside - But A went to the Court & said he would abide the award, & A could perform his previous duty i.e. to pay the money & B would abide - & A collected the money - then B refused to convey & A brought his bill in Chy. & then the Court said B to perform specifically or give ground for setting aside the agreement. 3 H. 10. 137. 2d case 24.

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die, the land which he leaves is immediately liable to the payment of his specialty debts & cannot be sold for any other purpose. What then would be the consequence when the owner before he dies, enters into articles agreeing to convey - now the question is, is the lien of the bond creditors discharged? I think it is not, for the debtors dies seized, i.e. the legal title not yet passed out of his hands. How is it in this? Apply the rule, that they consider that which is agreed to be done, & you will soon be able to determine what they will do - they say the lien is discharged, & the land transferred - *Wells 468. 4th ed. 2d. Cas.*

The same maxim of *lots of law* has its application to cases of this kind. Property however as well as to a small amount may be destroyed by the act of God as by Earthquake, lightning, tempests, &c. Now suppose A articles to convey Blackacre to B. the legal title is in A. but the beneficial interest is in B. Before the deed is executed an Earthquake swallows up the farm, whose is the loss? Why at Law it is A's. But it is vain for *lots of law* thus to decide, for Equity will decree the loss to be borne by the vendee (B.) according to their maxim, that what was agreed to be done is done in their view. There are however contradictory opinions as to this, but the weight of them I conceive to be as I have said. But if in this case the legal title is retained by A till B. performs a condition precedent, & before it is performed the property is destroyed by the act of God, the

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the Vendor (A) is the loser, for his obligation to perform has not, nor does it commence till the performance of the condition precedent. But there are which fall under this rule, in those where there is actually an agreement to convey and for some reason the deed is not executed at the time. 2 Vern 280. 1 P. W. 61261, 1 Bro C. 156. 2 P. W. 1288. 2 Bro C. 156. 69. 76.

I have already noticed to you that Chy did not in ordinary cases interfere in personal contracts, and that the principles on which they refused was because an adequate remedy was to be had at Law but if any particular case the principle does not exist, they will not refuse to interfere. Therefore it is that they will decree a specific restoration of a Family Picture. The detention of it will subject the party to damages, but this is not an adequate remedy for it being an object of desire, and vastly more valuable to the owner than the amount for which it would sell to an indifferent person, they will compel its restoration. To the case before mentioned where A. has obtained your note by fraud, & is a Bankrupt so that to sue him at Law would give you no satisfaction, & he refused to sue the note &c. in such case Chy will give you a judgment to offset us that note whenever it is paid. there is not an adequate remedy at Law in such case, & therefore it is that Chy will interfere. In many of the States, the mode of offsetting is regulated

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regulated by Statute. We have no Stat. of the kind
in force. nor was there any in Eng? till 25 Geo. 2.
30 Bl. C. 309. 2 H. Bl. 440. 4 T. R. 123. 5 T. R. 456.

I have observed that when a man comes
into Chy to ask Equity he must do Equity. By this
you are not to understand that a man must ac-
tually do Equity, before he asks for it, for in ma-
ny cases it may be uncertain what is the amount
of Equity to be done on his part - in such case if
he submits to do it as it may be decreed by the Ct. it
is sufficient. In the case of a mortgagee when
the mortgagee has been in possession, received the
rents & profits, made some betterment upon
the land &c. now if the parties cannot themselves
agree as to this, a Ct. of Chy will settle it; and it
is sufficient of the mortgagee when he comes to
foreclose the mortgage to do that which a Ct. of
Equity will say is just. The rule then is to be un-
derstood with this qualification. Nov 87. 3 Bro. C. Cas. 539.

There is a class of cases, over which the Ct. of Chy.
may exercise their jurisdiction, yet if there are cer-
tain circumstances attending, they will refuse
to interfere - E.g. Suppose A. and B. enters into ar-
ticles of agreement for the conveyance & purchase
of a house. Now if there is nothing more about
it Chy will compel a specific performance of the
Contract - But Suppose B. the vendor after entering
into the articles discovers that C. claims the title to
the same land. now altho the vendor may be allowed

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abundantly able to answer all the demand in cases
B. should be satisfied by D. yet D. may refuse to complete
the bargain, not wishing to buy up a lawsuit. In
this if application is made to the court, will they
relieve them is very doubtful. The rule, the rule is
vide. it all on the merits of the claimants, and if they
find there is, they will refuse to compel the vendor to
perform his contract. *specifically 20 B. 1199, 2 Atk. 119.*

Courts of Chy in Eng^d and in most of the
States have exercised a jurisdiction with respect
to the Payment of Legacies. Nothing is more usu-
al than to file a bill in Chy compelling the payment
of a legacy, but no bill was ever filed to compel
the payment of debts. The ground is this. The Exec^r
is liable to be sued by the creditors of the deceased at
Law, & to the amount of assets he is considered as stand-
ing in the shoes of the Testator. But cannot a legatee
maintain an action at Law for a legacy? No. The
acts of Law stop short, & refuse to make the Exec^r answer
only to the payment of debts & not to the payment of
Legacies. It was formerly the universal practice
to apply to the Spiritual courts for relief. They re-
fusedly made application to Chy. who granted relief on
the ground that the Exec^r was a trustee, and they
had cognizance over all trusts, whether of Real
or Personal property. ~~There~~ ^{There} has been an instance
of suing a mere naked Trustee at Law for the per-
formance of his trust. but cases of this kind have
occurred - e.g. when an Estate is given to a person who

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the donee is enjoined in the will to pay a legacy to A. out of the estate given to him. Here lots of land will maintain an action for it in favor of A. But in case of legacies to be paid by the Exec^r it is the universal practice to go to Chy to compel him to pay - but he may answer & defend as the Cell of the Legatee, on the ground that the property has been assigned to satisfy the debts. for the debts are to be paid before Legacies - In Court we sue the Exec^r for the non fulfillment of the trust in the common mode. Ques. Suppose the Exec^r makes an express promise to pay the legacy, may we an action to maintain it upon that promise? Yes if the promise is not cut off by the Stat. of Frauds & Perjuries - and he has assets.)

An analogy to the maxim that whatever is agreed to be done is done. Chy have always consid^{ed} that whatever is directed in a will to be done as done. Suppose the Testator directs Blackacre to be sold to pay the debts of A. B. &c. Now the Creditors can compel the Exec^r to sell, for he is a Trustee but suppose he directs the Land to be sold & converted into Cash, without assigning any reason for it now the Exec^r can't be compelled to make out of it on the ground of being a Trustee, yet Chy will compel him to sell it. In Eng^d it is an important principle for as it not sold it would all go to the Heir, & as it not only appears the Testator intended he should rather sell it. Here it is not so important, for the property is not to be distributed. There is however a qualification to

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to this. If a man devises land to be sold for a particular purpose, & there is a surplus left, that surplus will go where the land would have gone, as to the heir at law. e.g. Suppose J. T. devises blackacre to be sold for 2000^l of it. to be paid to B. and 2000^l of it to C. for 3,000^l. now the surplus (1000^l) will go to the heir at law for the particular purpose of the testator. as in *discovery* 18. 10. 1522, 2 Jo. 171. 3 Jo. 211. 1 Bro. Chy. 242. 3. Atk. 254. 1 Salb. 154.

In Eng^d if the Exec^r is directed in the will to sell lands, & he accepts of his office, he also accepts of this trust. But if the lands are devised to be sold, and no person named in the will to perform this trust, the Exec^r by accepting of the office of Exec^r does not accept of the Trust. Suppose the Exec^r will not sell the lands (in the case last supposed) and the heir also refuses, what is to be done? Why Chy will appoint a person to sell, and when this is the case payment is made to all the Creditors *pari passu* - no preference between creditors. Simple contract debts are to be paid as soon as debts due by specialty. In Conn^t our Courts of Probate have power to direct the Exec^r to sell in such case, whether he be expressly named or not in the will. A Stat. gives this power and if the Exec^r does not follow the directions of the will, he forfeits his bond. But if any other person is named by the Testator to sell his estate, as above, and he refuses the trust, application must be made to a Ct. of Chy. or Ct. of Probate as in

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authority over such a case. Suppose the testator directs D. C. to borrow to sell stock and pay the d. lts. and he does sell it for 3000⁰⁰ and then refuses to pay a covr. Now what is to be done? Had it been the Exec. of the Ct. of Probate Courts have compelled him to bring ^{the money to them} ~~the~~ & they would dispose of it according to the direction of the Testator. But in this case the Creditors must file a bill in Chy & they will compel him to go & pay the debts.

Courts of Chy have also assumed the power of compelling the Exec. to give bonds. In Eng. he is not in general compelled to do this, being a person appointed by the Testator himself, and one in whom he has confidence - but still if a Ct. of Chy find him to be in failing circumstances they will compel him to give bonds on the ground that he is a trustee for Legatees. But I think it very probable that Chy Courts compel him to give bonds in such cases, tho there was not a legacy given to the wife, when petitioned by the Creditors. This however may be uncertain.

I have stated before that Cts. of Law know nothing of an Equity of Redemption. I may mortgage an estate worth 20,000⁰⁰ for 2,000⁰⁰ now at Law this Equity of Redemption is not worth a farthing. but Chy will compel the sale of this equity & the proceeds of it paid to those creditors who could have collected their debts out of the Real Estate. Out of this business of an Equity of Redemption

Revers of Chancery.

an evil may accrue to the Mortgagor ²⁷. E.g. Supp
B. the mortgagor has lent his money to A. the mort-
gagor. B. has taken the mortgage merely as a se-
curity, in expectation that A. will repay him. Now
suppose the mortgagor does not. Can he sue and
recover the money lent? Yes. But suppose A. is
not able to pay it. Can he sue & obtain posses-
sion of the land? Yes. But the effect of this is only to
give him the rents & profits, & it may be many
years before he can receive the whole amount paid.
Chy vice therefore Supp B. to file his bill, Comp =
pelling A. to foreclose, and if he does not the Equi-
ty of Redemption is gone forever both in Law &
Equity. But then does this foreclosure operate
as a payment of the debt? Suppose the farm
is mortgaged for 2,000£ and the mortgagor has p.
£1500. Now will not the mortgagor recover back
the money paid if there is a foreclosure? No.
He has no more. But a receiver is paid the m.
mortgagor may bring a foreclosure for this and the
payment of all the rest will not prevent him.
Neither can the mortgagor when sued at Law for
the money plead the foreclosure in bar. But
if this is done & the whole amount received at
Law (i.e. the amount remaining due) the benefit
of the foreclosure will be gone forever & Chy
will decree p.

In Court we treat the Equity of Re-
demption just like any other Estate. It will

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to be attached & sold for the benefit of creditors, in the purchaser put in the same situation that the mortgagor. e.g. if mortgagor has paid to B. for 2000⁰ and the Equity of Redemption is worth 3,000⁰. Now the creditors may buy an execution upon it & sell it at auction. and B. ^{will have} paid the 2000⁰ and then the purchaser stands in B's shoes. i.e. the ^{same} is liable to the same Equity of Redemption which it would have been in the hands of B.

Text^r 10th May 18th 1842.

There are many cases where A. has the legal title to property, & the beneficial interest is in B. A. in such case is a Trustee for B. the cestui que trust.

The right of the Trustee, to purchase the interest of the cestui que trust, has been the subject of much controversy. The Law Commission is now fully well settled. Whenever the Law constitutes a Trust, as it does in all cases of Bankruptcy, where the property of the Bankrupt passes into the hands of Assignees; or where a man dies & his property passes into the hands of his Executors the assignees & Executors are trustees and hold the legal title to the property. Now in these cases a Que. has arisen whether he may buy of the cestui que trust, his beneficial interest? This I say has been the subject of dispute. Some have said that if the trustee purchases the whole of the cestui que trust for less than its value, that a Ct. of Chy. will interfere, & treat the contract as void. Others have contended that it is voidable

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wrong for him to purchase, whether by the contract. the cestui que trust will receive the full value of the property or not. The principles on which these two opinions were given were very different. Those who decided on the first position went upon the ground that if the trust was not abused, the conveyance should be good. the ground for the latter opinion was that the Trustee being a fiduciary for the cestui que trust, he should not have the liberty to trade & speculate with him at all that it gave the trustee an opportunity to make money out of his trust, when the object of the same was, to give to the cestui que trust all the advantages that could result from the trustee faithfully performing his duty. 2 Bro Cty 400. This was a case where the Trustee bought the estate of his cestui que trust for 40,000 £ and soon after sold it for 50,000 £. and the Ct. of Cty interfered & made him pay over the 10,000 £ to the cestui que trust.

There came a case before the Ct. in which the contract appeared to be a fair & honest one and the Chancellor refused to interfere on the ground that the Trustee had ~~acted~~ dealt fairly with his cestui que trust, and had not abused the trust. This was decided in conformity with the first position. But the decision has been subsequently a number of times overruled on the ground that the trustee in no instance shall ever be permitted to trade with the cestui que trust for the reasons above given.

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Neither will the Trustee be permitted to purchase in a circuitous manner as if the Bankrupt's property on the Insolvent Estate is disposed at auction vendition, they will not be permitted to bid themselves nor to procure another to bid for them. indeed the rule is well settled that the trustee cannot purchase in any case, so as to give himself any opportunity to gain any thing thereby. 6 Ves. 627. 4 Bro. P. Cas. 258. 3 D. & J. 790. 5 Ves. 678.

Suppose the Trustee is willing to pay more for the property than any other person, will he not be permitted to purchase in such cases? No unless it be under a license from the Ct. of Chy. Those however will always grant this license, if the subject is laid before them - it appears that the trustee is willing to give more than any other person. - But of this has grown.

Another Q. May the Assignees of a Bankrupt purchase the property provided a majority of the creditors are willing? Lord Hardwicke in 1749. rather gave it as his opinion that they might purchase in such case, but this has been overruled and the opinion of Lord Eldon was (see 6 Ves. 638) that in most cases a majority of the creditors could control the property, &c. that this was a case in which the minority were not bound to acquiesce in the opinions of the majority - and therefore the Assignees could not be permitted to purchase.

In what manner does the Ct. of Chy.

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interior? Let us take the example before given where
A. the trustee purchased the estate of B. The vesting
you trust for 40,000 £. and then sold it to C. for 50,000 £.
Now it is a clear case that you can cut off the
title in the hands of C. for it is a principle well es-
tablished that when the sub-sequence bona fide pur-
chaser, purchaser of him who holds the legal title
the in fact he may be a Trustee for another, the pur-
chaser will hold provided he was ignorant of the
trust - and in this case too there can be no relation
on the part of C. for buying the estate, because A.
can deduce his title from B. and whereby it appears
that he has not only the legal title, but the bene-
ficial interest too. What remedy then was the
vesting you trust? We can compel A. to pay over
to him 10,000 £. for so much he (A.) has received
for the estate, over & above the amount paid for
it, on the original contract between A. & B. But
suppose A. has not sold the property - what will be
the harm if it is suffered to lie in his hands. he be-
ing a responsible man, & able to pay or else he
should sell for an enhanced price - But they may
compel him to give up the contract at least, on
the ground that he now be tempted to sell the prop-
erty for less than its value. he will not be so apt
to consult the interest of his vesting you trust with
as much care as he would provide the title to
beneficial interest in the property, still contained in
the vesting you trust, & see this 453. 10 Nov. 423. I

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Suppose the Ct. might at least compel the trustee to give up the contract but it is not in ways that they will allow him to give it up &c. Suppose it is necessary that the estate be sold for the payment of debts &c. and the trustee purchases of the estate, give him to agree to give it, &c. for it now perhaps this is more than any other person will give for it. a Ct. of Chy. will therefore hold him to his contract, and order the estate to be sold up at, &c. &c. and the amount offered by the trustee will be considered the first bid. and if any person is willing to give more they will compel him ^{the more} to give up the bargain. and if no one will give as much they will hold him to it.

Again. Suppose the trustee has purchased and given the full value of the estate ^{at the time of purchase} and afterwards the land rises in value. Now a Ct. of Chy. will say that as the trustee may be compelled to give up the contract, so the estate, give trust will be entitled to the rise. But suppose before the rise, the trustee has gone upon the estate, & improved it. built houses, fences &c. will a Ct. of Chy. compel him to give up the contract? Yes. But they will compel the estate, give trust to pay back the purchase money, and the amount of the improvements. for in this as in all other cases a Ct. of Chy. adhere strenuously to their maxim of doing perfect justice betwixt the parties. 624. to 200. 400. This then is the established law upon the subject. — ^{It is seen in page post, at the bottom for a principle which sh^d. be inserted here, included in [] —}

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It is a never failing maxim that property of a person deceased must be applied to the payment of creditors, before any other use can be made of it - therefore all voluntary, as legacies were to be postponed till all his debts are paid. Now it is the duty of the Exor. to pay the debts. Suppose then J. S. dies & leaves A his Exor. and owes B. a sum of money due five years hence. The estate being abundant A. pays all the debts except this one, which is not yet due, and for this he receives sufficient money to meet it on the day of payment. Having done this he distributes the rest of the property among the Legacies & volunteers, according to the direction of the testator. Suppose then when B's debt becomes due, he finds A. a Bankrupt - what is he to do? He may have an action vs him at Law, but this will afford him no remedy for after obtaining a judgment he will be unable to collect his debt. Can he go vs these volunteers & collect his debt out of them? The argument they use is, that the Exor. has received from the estate the money to pay this debt, that the remainder was given to them and that it is no more just for them to be compelled to refund it, than for A. to lose it. But the maxim is unyielding that the debts are to be paid. No fault is to be imputed to A. he cannot not make a good use for payment before his debt became due. therefore on failure of the Exor's ability to pay the assets in their hands may be pursued. The Exor. knows nothing of giving a

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an action vs any other than the Executor. But in this case the remedy at law being entirely inadequate, the Cr. of Chy have intended the manner that the debts are to be paid, & and given the Creditors liberty to collect it out of the volunteers, by pursuing their assets in their hands.

Again. Suppose the Execr is not a Bankrupt, and has paid the whole property to the Creditors and the volunteers, without saving any thing for the pay^{ment} of this debt. Does he need a bond? but to secure himself he has taken a bond from the volunteers that they will pay this debt or its become a debt due. Now can he sue the Creditors call upon the Legalees, & coll. the debt out of them? No. Because he has an adequate remedy at Law vs the Execr. He must then sue the Execr and the Execr has his remedy on the bond. But suppose the Execr has taken no bond, but has paid over all the property to the volunteers, & trusted to their word to pay this debt. and the Creditor comes ^{upon} him & compels him to pay it. Now can he (the Execr.) sue the Legalees & recover it out of them? I have never seen a decision of a Cr. of Chy in favor of an Execr in such case, unless he takes a bond from the volunteers. But this is really a very hard case and appears to me perfectly inconsistent with those principles of Equity & justice which Crs of Chy profess to be governed by. What has the Execr done in this case, that they should refuse him a remedy? Why the most that can be said is, that he has been guilty of Carelessness for no fault can

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can be imputed to him. It is for sure that if there, that a Ch. of Chy have seen fit to deny him that is, which operates as a penalty upon him. i.e. he is compelled to answer the debt out of his own Estate. It is true, that their refusal in this case but, it is contrary to the principles of justice & Equity, which are properly the polar star to all their actions. But so are y^e decisions.

It is a rule in Chy. that where property is devised ~~and~~ for the purpose of paying debts out of the rents & profits of the Land, that if the debts can not be paid without selling the Land that they will order it sold. It is not devised to be sold, but devised to raise money out of the rents & profits to pay debts. In such case the intention of the deviser fully appears, viz. to pay his debts. therefore if the means he conceived would pay them, should prove inadequate to carry his intention into execution, Chy will order it sold. or so much of it as is necessary to complete the purpose. 2 Vent 357. 1 Vern 256.

Suppose A. mortgages his farm with 2000^l & B. for 1000^l. now the mortgage is considered as a trustee for the mortgagee. but still he is allowed to purchase the Equity of Redemption and will not if as any other purchaser would. So where any one holds property as a trustee or pledge for the payment of a debt, he is permitted to purchase the property, altho he is a trustee for the payment. These are exceptions to the general rule before laid down. these exceptions are not in the 3^d page ante in the bottom. - A.

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It is a rule that the property of the decedent is to be applied to the payment of debts - Now suppose there are among other claims but one need to be satisfied it appears that Tom Tides has a bond to the estate for 10000 £. The bond was entered into by the father for the purpose of providing for his son without any design of defeating the claims of his creditors. Now is the son to be treated as a bond creditor? It appears to be so and the obligor is bound by it - the only persons who have a right to complain are the creditors of the decedent. But it so happens that if this bond is paid, the creditors will be defeated as there will be no property remaining. Now the payment of this bond must be postponed till the other creditors are paid and then the duty of the son is to be performed before any other volunteers. Therefore if the exec^r knows this to be a voluntary bond he will so conduct, i.e. he will pay the debts first.

But suppose he does not know it - Why then he (the exec^r) has a right to file in a bill in Ch^y at the expense of the creditors or the son calling them in to dispute the Dec. and as the Ch^y decide so he will act. This has given rise to some difficulty under our practice - the principles here are the same as in Eng^d but there is upon our side no preference of creditors - If the estate is insolvent, it is all sold and the avails put into the Ch^y of probates & by their distribution paid pro rata. Now suppose if this voluntary bond is thrown out, there will be sufficient property to pay all the debts. Can the Ch^y of probates refuse

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payment upon it? What authority have they to do this so long as the Commissioners have found this to be a good debt? I suppose then, in such case the Rule is for the commissioners to admit this as a voluntary bond subject to the discretion of the Ct. of Probate, and then the Ct. will decide whether it is a voluntary bond or not & whether it is entitled to be ranked among other demands vs the decedent's estate or not. But in doing this it is in another principle of Law is violated, and that is that the Ct. of Probate are judging of a matter of fact - this is true, & there is no other remedy for the person aggrieved, than to make application to the Superior Court. 1st Feb 1920 197.

Sect^r 18th May 19th 1813

Courts of Ch. also exercise the power of
Issuing Injunctions.

This power undoubtedly originates in those cases where relief from a prosecution could not be obtained at law but which owing to the particular nature & justice of the case demanded the interference of a Ct. of Equity as e.g. when a contract was procured by hardship but not by legal duress in such case a recovery could be had at law, but a Ct. of Ch. on being made acquainted with the means which were used to obtain the contract would issue an injunction, not to proceed further till they had returned upon the rights of the parties. These injunctions have either temporary in the first place and when they

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had considered of the case, they rather remove the inju-
ria or make it perpetuum, as the justice of the Law
seems to demand. From these, they have extended the
power to other cases - and the

1st are those of waste. Now whenever a
Tenant commits waste, an action will lie at Law
for the damages. But the power which they exercise
is to prevent the waste - as suppose the Tenant is
about to cut down the timber on the land, they will
issue an injunction ordering him to desist. Now an
action will lie for the waste if committed, but it
may be an inoperative remedy, as if the tenant is
a Bankrupt & unable to pay the damage which may
be recovered by him at Law.

When can this injunction be obtained? It can
be obtained in all those cases where an action at
Law will lie for the damage. and so it will, in na-
my instances where an action will not be maintain-
ed. In those cases they seem to have proceeded upon
a principle unknown to Cts. of Law. But the fact
is that they have extended the principles to cases which
Cts. of Law refuse to consider as falling within them.
e.g. Cts. of Law cannot give an action for waste vs.
him who has the legal title. e.g. an estate is devised
to J. S. for the use of T. S. Now if the trustee should
go on & commit waste to an indefinite amount, the
action of waste would not lie vs him. the action
is, to modern opinions, there is no doubt but Cts.
of Law as well as Cts. of Chy. would sustain an

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action for a breach of trust. The action of waste is however the beneficial action, as it gives treble damages, & the thing wasted. But a Ct. of Ch. will not hesitate to issue an injunction as a ^{remedy} in such case, any more than in another prison who had not the legal title. 3 Bac 173. Darn di 46. 20.

A Tenant in Tail, after possibility of issue extinct, cannot be prosecuted in a Ct. of Dam. for the commission of waste. But a Ct. of Ch. will issue an injunction to him. This remedy happens, when one is tenant in special tail, and a person from whose body the issue was to spring, dies without issue, or, having life issue, that issue becomes extinct. In either of these cases the surviving tenant in special tail, becomes tenant in tail with possibility of issue extinct. But the waste must be wanton, or unreasonable, to induce the Ct. to issue their injunctions, 2 Show. 89. 2 Eq. Ca. ab. 221.

The Law knows nothing about issuing an injunction for waste as the mortgagee who is left in possession of the Estate. for they consider him as Tenant at will, and know nothing of his Equity of Redemption. But if by committing the waste there is danger that the mortgagee will lose his security, they will issue an injunction to him. So if the property mortgaged is worth very little more than the money lent. But if notwithstanding the waste the security will be abundant, they will refuse to interfere. So if the mortgagee is in

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possession in a fee tail by the Mortgage. Chy will not
join him from the conveyance of the estate, for altho he has
the legal title, yet Chy consider him as a trustee for the
Mortgagee.

At l. d. this action of waste will not lie is
one who has a larger estate than a life estate for
life. It never lies in favor of a remainder man or re-
versioner, if any other estate intervenes between the re-
mainder or reversion, & the estate in possession. Eg. T. S.
is tenant of an estate for life, with remainder over to
S. W. for his life, with remainder over to S. W. in fee
simple. Now if T. S. the tenant for life commits
waste, S. W. the remainder man can sustain no
action at law vs him, in account of the life estate
of T. S. which intervenes. This is a technical rule &
I think an unreasonable one. Chy however will
grant an injunction in favor of S. W. the remainder
man. 3 Atk 94. *Turner v. Bond*; 11 M. & S. 250. 13 B. C. 227.

A tenant for life is always liable for
waste, let him come to his tenancy how he will;
unless in the conveyance to him are these words
"without impeachment for waste." and even in
these cases Chy will sometimes enjoin. They un-
derstand the intention to be this, that the Tenant may
do all those things which are commonly called waste,
such as cutting down the timber trees: But that it
never was designed that the tenant should be al-
lowed to cut down the orchard shade trees
around the house, or to pull down the buildings.

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and. Ct. of Chy will always issue an injunction to stop this wicked & wasteful waste. But in these cases Ct. of Sams know nothing of giving an action of waste, against the express words of the conveyance. 3 Show. 109. 2 Vern 738. Cro. Ch. 292. 2 Atk 216. 1 Salk 161. Anll 107. 2 Bro Chy 89.

Under this head there are one or two cases, of the correctness of which I have some doubts. e.g. Suppose the farm is leased to A. without impeachment or waste. now it has been decided that if the tenant sends the Sams to search for mines of metal, real &c. that it is waste; for that is a detriment to the inheritance: but if the pit or mines were open before, it is no waste, for the tenant to continue digging them. This is a case I think, not falling within the principles. 2 Bl. 286. 3 Rep. 12. Hob. 295.

11th Ct. of Chy will also issue an injunction to stay proceedings at Law, even after verdict and judgment, in all those cases where Ct. of Sams will enforce contracts, against which Chy gives relief. 3 Bac 172. 2 Com 46. 10 Vern 229. 489. 2 Vern 71.

Ct. of Chy. always in issuing an injunction impose a penalty to enforce obedience. and for some reason the action on this penalty, is in Eng^d always brought in the Ct. of Chancery. But I am sure not the least reason why an action will not lie at Law upon it, as well as on a Bond. I am not an action at Law, and no one doubts but it will lie. I am sure that since it has been the universal practice in Eng^d

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to sue in Dam. A suit on the promissory was once brought before the Federal Court in Court. The case being novel, they refused to render judgment until they had taken time to consider upon it. - but before the next term the cause was settled by the parties & no decision ever had upon the Question.

These injunctions are either temporary or perpetual. The temporary injunctions are usually issued to the party and to the Ct. Where one is said on a contract, which on a Bill filed in Chy. is found to be fraudulent, they will issue a perpetual injunction vs their proceeding further. 1. 4th 628. 3. 16. 350. Amble 56.

The form of proceeding in an injunction vs a Ct. of Dam. is, in Court. Somewhat singular for our C. S. Courts & Ct. of Chy are composed of the same judges. When the Ct. proceeds as a Ct. of Dam they are governed by legal principles, when as a Ct. of Chy, by the principles of Equity. Now a bond was sued in the Ct. of Dam, & usury was pleaded to it, but it clearly appeared on evidence, that there was no usury, but that a mistake had crept into it, in favor of the obligor of about 50 £. Now as a Ct. of Dam, they were unable to rectify this mistake, but as a Ct. of Chy they could. therefore they issued an injunction vs themselves, (as a Ct. of Dam) with orders not to proceed till they (as a Ct. of Chy) could rectify the error; and this being done, they proceeded to render judgment for the true amount. 2 Cases Di. 48. A

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A Ct. of Chy. will always issue an injunction to persons acting in a particular capacity, when their right to do so is disputed. as if Stokes and Nokes be in dispute, which of them are entitled to the executorship of T. W.'s estate, & Stokes sues Nokes & Co. Chy. will enjoin him to assist. See the right is determined. 2 Mac. 416. Fort. 68. 1 Feb. 1799.

There was formerly an authority assumed by Ct. of Chy. to issue injunctions against all others, as all who should attempt to republish their works. This was an uncommon thing, until the Stat. of Anne was made which gives the party a remedy. This Statute has been copied in most of the States, therefore application to Chy. is now never made unless it be in a particular case not within the Statute. The ground on which the Ct. proceeded was, that every man has a right to the monopoly of his own ideas, this spread upon paper & published to the world, was the unprotected by any positive law. There came up a Que. whether the author had this unlimited property to his own ideas, which was well examined in a case reported in 4 Burr 241. Three of the Judges among whom was Lord Mansfield were of opinion that by Law an author had this right, and that for the violation of it an action would lie. But it seems to me that the arguments of Justice Yates who was in the minority are conclusive, tho my feelings would induce me to the other side. — There

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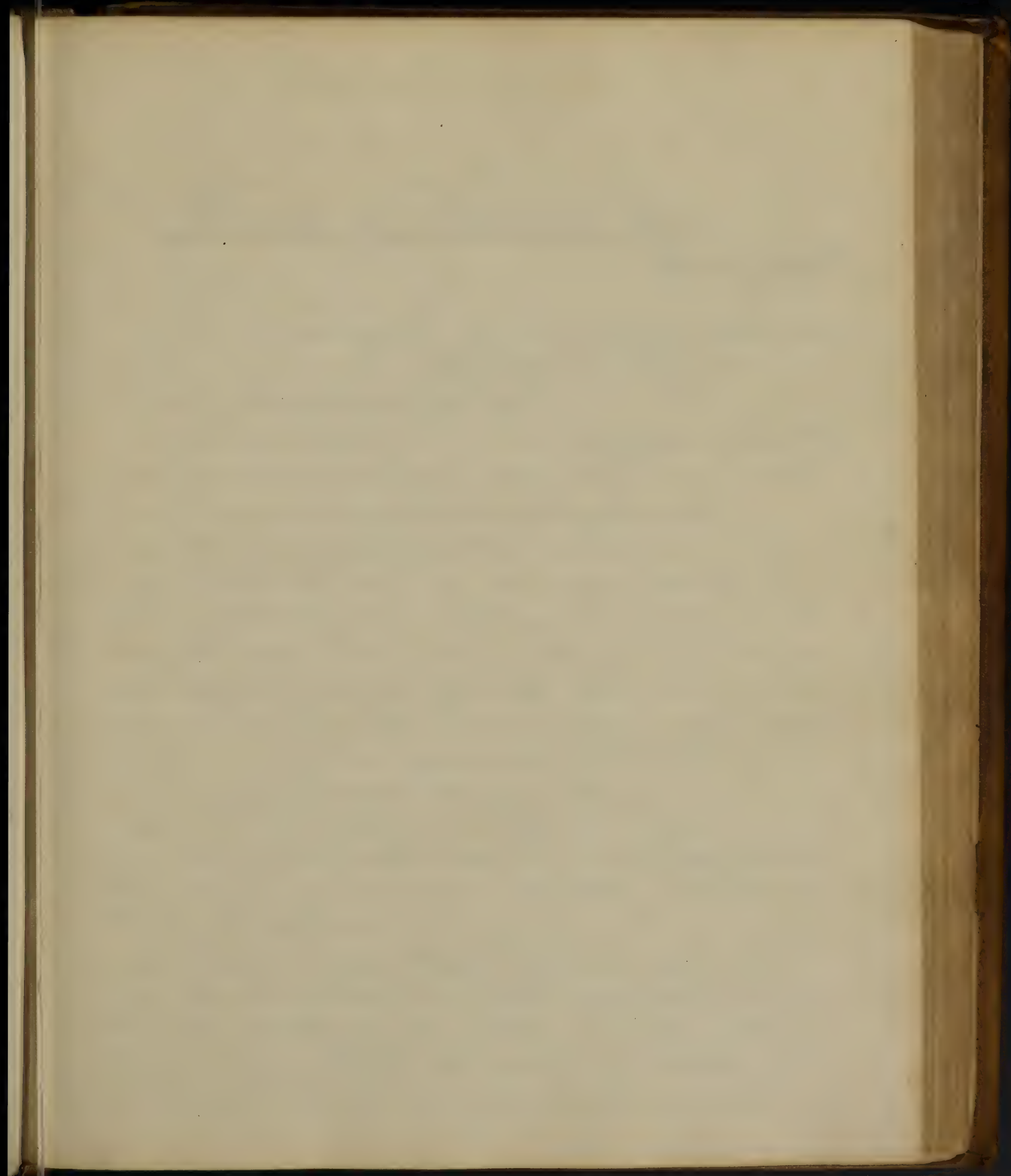
There arose another Question which was which in the Stat. of 1793, which gave rise to them. This takes for a certain number of years has taken away the Ch. right, & substitute another in its stead, - whether the Statute remedy was cumulative. The history of the case was this. Some out of number of the judges were of opinion that the author had a property in his works at C. D. But great part were also of the opinion that the C. D. remedy was taken away by the Stat. while the others, & I think correctly, considered the C. D. right neither taken away nor curtailed, but that the Stat. gave a cumulative remedy. The Dec. was then carried up to the House of Lords, where they were equally divided, and the Chancellor was called in to determine it. and he decided that the Stat. of Anne was the only remedy. Of course our Stat. according to this decision is the only remedy in U.S.

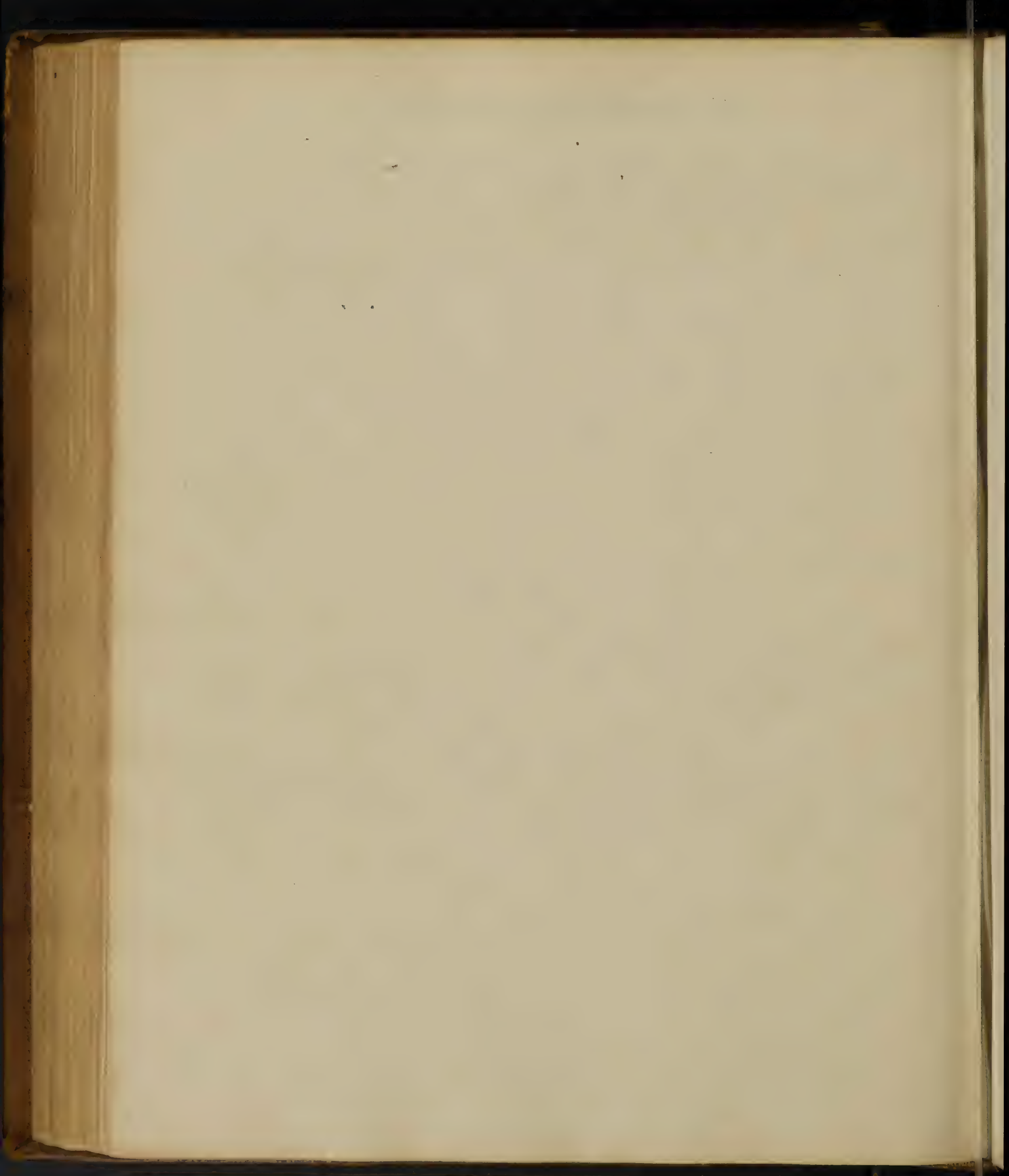
The English Ch. has also assumed the power of issuing injunctions in cases of Equity, where the right has been several times tried in the Courts of Law. The action of Equity is in England maintained by a fictitious plaintiff, and when successful to recover, the party can commence another action to try the same right in the name of another fictitious person, and therefore did not Ch. issue an injunction in such case. The controversy would be interminable. But in Court. the action is not grounded on fiction, but on a real claim on the off. - therefore no remedy for the rule here. Bull. Ch. 281. 1 Pra. Rep. Cas. 226. 1 P. W. 671. H

Devers of Chancery.

It has been said that the will not grant an injunction in any Criminal case. But this proposition is too broad. Suppose A is prosecuted by a Public Officer for diverting a watercourse, which subjects the offender to a penalty. Now if there is any defence on the part of the offender, & by as to whose is the right to the watercourse, the will enjoin the public prosecution until the question of the right is determined in the civil action between the parties. This is the only instance in criminal cases where they will enjoin. If no civil action has been brought at the time, no injunction will be granted, unless security is given that an action shall be commenced. 2 Atk 302. 3. 2 Bro 64.

This power of issuing injunctions in Eng^d has been extended over all their Courts. and in this Country the same power exists, tho in some cases, it is unnecessary to repeat it, as in the cases of proceedings before Courts of Probate, from whose judgment an appeal may always be taken.
et. finis.





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By Mr. Gould.

General powers of Chy. are not easily defined. Will. 3. 3 Bl. 477.
Lord Cairnes, description.....

1. To abate the rigour of the C. S.
2. That it decides according to the spirit of the rule not of letters.
3. It is said that Fraud, accident, & Trust are peculiarly cognisable in Chancery. Will. 3. 4. 10 Mod. 1.
4. Not bound by precedents or rules.

1st "No such power" re. e.g. Heir & co. formerly before Stat. 3. & 4. 11. 12. of bond Creditors, whose debtors devised away their real Estate. If lands devised or inherited, not now liable to simple contract debts. That Father & Son never inherit. &c. half blood excluded from inheritance. Equities cannot change reputation to the land. 3 Bl. 430. 2 Bl. 378. 244. 245. 208. 377. 227. 2. Atk. 239. 2 Bl. 400.

2nd "Deciding according to the spirit." So must a Ct. Law rules of Construction common to both. 3 Bl. 431. 434. 437. 1 Bl. 61. - Same rule as to the construction of Contracts. Doug. 264. Wat. S. 97. 8.

3rd "Fraud, accident, & trust." But fraud of perhaps every kind is in some way or other cognisable in Ct. of law. Sometimes exclusively, as obtaining a devise. - Many accidents also, as loss of deeds mistakes on accounts. Contingencies which render performance of a word impossible. Some which

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which are not reliable in Eq. e.g. Deviser ill executed, con-
tingent remainder destroyed &c. *See* 69. 11. 20. 28. 548. 3. 11. 77. 544.
5 Co. 74. 2. 7. 1. 101.

Trusts are generally cognizable in Eq. only not actions.
e.g. Bailments. money had &c. use. to another use. *See* 11. 4. 31. 2.

While an action on the case at law, will lie for the
violation of a trust in Eq. *See* 11. 4. 31. 2. 11. 4. 31. 2. 11. 4. 31. 2.

Chy. will in some cases aid a little defective at Law.
See 105. 2. 11. 209.

Mistakes in written instruments generally aided in
Chy. only. *See* 105. 2. 11. 203. 3. 11. 389. 105. 312. 2. 11. 376. 7. 11. 62.
341. 11. 399. 1. *See* 105. 94. 2. 11. 1. 7. 8. 418. 4. 77. 5. 11. 1503.

4th "Precedents" &c. Chy. of Chy. are bound in precedents.
e.g. refusing wife her dower in trust estate, yet allowing her
curtesy. Distinguishing between a mortgage at 5. 1. 6. with
clause of reduction to 4. & vice versa. These are positive
rules founded on precedent. *See* 11. 11. 321. 2. 11. 640. 1. 11. 609. 11. 4. 101.

Blackstone's distinction of difference from Law. "Principals
in the mode of administering justice. 1. Of Process. 2. Of Trial
3. Of Relief."

1. Of Process compelling a discovery from a party under
oath, & putting to parties under oath the facts relating to his
knowledge. *See* 11. 351. 2. 4. 2. 469.

Hence Chy. concurrent jurisdiction in matters Loc. &
is incident to this in the concerns of ass. & execs. dis-
tribution - partnership concerns - bailiffs, receivers &c. & aud.
& then their judgt. is the same as at Law. *See* 11. 148. 2. 11. 437.

Process of Chancery.

2^d of Trial. In Eng. the interlocutory is in which depositions are taken out of Court (not so in Ch. in contracts) when witnesses are about to leave the Kingdom, and in firm & positions de bene pde are granted to, for future testimony. 3 Bl. 382. 3. All. 1^o. 130.

In consequence of this power to take depositions &c. &c. &c. &c. the jurisdiction which is exercised at Law & Equity is attended.

3^d of Relief. This is specific as in case of Exe & admors &c. &c. of purchase & lands. Considering as done what ought to be done. Want of specific remedy at Law, gives Ch. a concurrent jurisdiction in many cases, where dams are recoverable at Law. 3 Bl. 438. 8. C. all. 16. 3 Bl. 215. 1. Forb. 413. 6. 10. 532. 3 Bl. 438.

Injunctions v. waste. preventive as decrees to prevent multiplicity of suits - vacating contracts for fraud. 3 Bl. 408. 12. 308.

Chs. of Law & Ch. differ in these three respects. but they differ in others also - e.g. at C. S. the whole penalty of a bond is recovered on forfeiture - in Ch. the sum really due. Case of mortgage - Eq. of redemption. 3 Bl. 432. 434.

When a Contract has been legally executed, the bond is in the consideration. Chs. of Law must give judgment in favor of it. but Ch. will not decree performance in case of any bond, or unfair advantage, & will ever set it aside. 1 Bl. 2. For. 422.

Trusts as contradistinguished from legal est. another source of jurisdiction. 3 Bl. 439. 2 Bl. 645. 668. 4.

Besides Bl's. distinction perhaps one more to truth is, that Ch. may,

1. Enforce justice where positive law is silent.

2. May abate the rigor & supply the defects of the C. Law.

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when such rigor &c. are a collateral, purpose or consequence
of the rule of Law. Thus if it be a direct & obvious con-
sequence of the rule, & if the rule be designed for p. cases
to which it literally extends, 1. H. 1. p. 3. 4. 103. 1. B. 1. 370. 2. G. 420.

E.g. Marriage settlement, covenants, specific execution
generally - injunctions & waste.

Power of decaying specific perform. has been exercised
in Eng. from the time of Edw. I. There was a contest between
Chas. & Henry Bench in the time of Edw. I. This power was soon
after established, & the exercise of it was common in the 2^d
year of the reign of Car. II. 628.651. 1706. 27.8. 21 Dec. C. 5.6. 1706 -
6.354.368. Dutch 172.

Harv^o. Settlement, account made before mar^o. Specifically
all decreed in 6th. March 1893.

Donnerstag den 1. Jan. 1800. 1132. 442. 620 6. 551.

So, if the instrument be a Bond to make a settlement either after or during coverture - it is consid^d. as an agr^t. &c. adverts to the substantial object. 1 Fonb. 924. 2 W. 243. 2 Vern. 480. 7 A. C. 97. Row. C. 316.

Such a bond was formerly held by some to be avoided at law, whether forfeited during or before conversion. Decided that a bond forfeited after conversion good at law. *Wheat*. 480. *St. Ray*. 515. *Holt*. 216. *Salk* 325. 5. *T. R.* 381. *1 Pow. C.* 442. 3.

If such bonds were pay'd during 2009, it w^d be void
at law. Such 328.

Formerly it again^{ly} were made between his & wife's divisions.
They ^{are} not to be enforced even in Eq. but thro' the medium of trustees.
Co. L. 3. Art. 14. Sec. 2. Sec. 3. Art. 22. S. 16.

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See new ornaments during car. & gifts to her Soli.
Separate use here suggested in Ch. 1. 4th. 270. 3. 210. 337. 2. 122.
1. 5th. 95. 1. 6th. 245. 2. 1st. 308. 1. 2nd. 88.

And the wife may dispose of the property as a feme sole.
Not so in Saw. 110. 442. 66. 112. 113. 144. 205. 444. 210. 194. 665. Day. 221.

But such arguments &c. if made voluntarily & accompanied with any indications of fraud, are not valid to creditors or purchasers. 150195. See Ch. 22, §. 2. W. 339.

But its being merely voluntary (i.e. in this case without
vol. considⁿ) is not conclusive evidence of fraud. (2 R. 27.
10th & 26th. Conf. 208. 1. & 11. 15. 2 Mc. 292.

Husb^d being indebted is a badge of rancor. 4th q^r. 10 Feb. 261. p. 4. t.
So is a power of revocation. So if the conveyance of the
whole or greater part of grantors property. 3 Co. 87. 2 Co. 510.
2 Bulst. 218. 10 Feb. 262.

But voluntary agreement is binding on the party himself.
This Rep^s 1 Hen 6. 264. Marw. 132. 404. 470.

Eqy. adheres to the substantial object of all contracts -
is not about to that - not regarding forms - e.g. bond treat-
ed as an agreement.

So in Eng. if one Co obligor pays the whole, Co. will not
compel the other to pay his part or if action is brot. v him on
the bond in paym^t, will restrain him from pleading the pay-
ment by Co obligor. It is consid^d as an agreem^t between the
Co obligors - Qu. will not indub. a p^t for money paid to p. thus
use! as in *Cinn. v. Litch*? 10 Penn. C. 315. 2 Woodf. 4. 2 B.C. R. 949. 0. 3 Bay. vol. 7. 74.
423. 8 H. 166. 7 Hard. 154.

Rule laid down - Equitable interposition extends to all cases.

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cases in which the subject of the contract or the parties are within the jurisdiction of the Ct. For the Ct. acts as well in personam, as in rem. 2 How. c. 8. p. 1. 4 Conn. Ct. 1. 2 4 Ark. 19. 11 N. H. 184.

Meaning that, when the matter in dispute, is such as to require the interposition of Chy. Cts. will take cognizance of it, either the subject contracted about, or the party bound is within the local limits of the Cts. jurisdiction. e.g. The Debt within the realm - the land which he agreed to convey, being in Sea. Where the decree acts in personam, by process of contempt & sequestration of Goods & Lands. House in Philad. settled in Eng. - Co boundaries of Penn^a & Maryland settled in Chy. in Eng. according to articles. 200, 204, 447, 444, 454.

Formerly Chy. C. act. only in personam, not in rem. Now
it can act in rem, by issuing process to put a party in
possession of land (within its local limits) by injunction & writ
of assistance to the Chf. i.e. injunction to Def. to deliver
pos'n - on his refusal a writ to the Chf. ordering him to
aid & assist in putting pos'n in poss'n. 1 Hon. 31. 2 Hon. C. 8. 9.
3 Ark. 275. 587. 1 Ark. 593. 12 Ark. 454. 3 Ark. 275.

The practice of acting in rem first began in the
reign of Jac. I. 1603. 454. 1603. 31.

General rule is, that Ch. will decree specific performance and agents property falling within its jurisdiction in those cases & generally those only in which the Law will give damages for non performance. What cases fall properly within its jurisdiction post. 2 Cow. C. 14. 6. Port. 139. 2d June 21. Cas. Ch. 67. p. 406. 176 B.C. 327. - Ergo will not enforce a contract made under seal. Port. C. 34. 2. 1. 10. 10 Jan. 38. 120420. 74.

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Exceptions on both sides of this rule. First, performance not always secured, the Dam^t. might be recovered at Law. e.g. Bill to have convey^{ce} of land if it is, no time & bona fide purchasers, for valuable considⁿ without notice. 1 Font. 359. 1 W. 422. 279. 282. 2 Com. 338. 1 How. 2. 161.

But agreement to convey to in a valuable & ad. good considⁿ good w. no one judg^t. creditors. Focus if the considⁿ of the agreement is very inadequate, the Dam^t. might be had at Law, no decree in Eq^y in latter case. 1 W. 282. 1 How. 2. 161.

So where the bill is to compel debt. to accept a conveyance & to pay the considⁿ Chy. will not decree if, pl^{ff}'s title is under embarrassment not immediately removable, the Dam^t. might be recover^d at Law. 1 Font. 176. 2 W. 201. 2 How. 2. 39.

So if one agrees to sell land belonging to another - no decree - yet Dam^t. recoverable, at Law. 1 How. 2. 161.

Secondly. Exceptions on the other side is, where Chy. will decree, tho no Dam^t. at Law. e.g. Bond &c. by some sole to convey land to her intended hus^d (ut. supra), destroyed at Law by the intermarriage - so no damage - but a good agreement in Eq^y. So agreement during Coverture. (antea. 2 How. 2. 16. 254. 7. 2 W. 243.

So tho in the last case some sole were an infant if the agreement was with the approbation of her parents or guardians upon adequate considⁿ. 2 W. 244. Font. 689. 3 Atk. 607.

So where one lends money to an infant, & whistly. latter expends for necessaries. 1 Font. 68. 1 W. 558. 9483. 5 Mod. 368. 2 How. 2. 258. 4.

So where obligor in an obligor bond, takes a discharge of obligee, after notice. (See "Cout broken" p.

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So where the agreement arises under the acts of the Ch. of England, e.g. a judicial sale of an estate or purchase by a master, the no dam. at law. 2 P. C. 119.

So where the cond. of a land is destroyed by obligor becoming exor. to obligee. 10 Mod. 515. 9 Mod. 67. 2 P. C. 254.

Powell states the distinction between cases where Ch. will decree not decree specific execution, where no dam. can be had at law, to be this. If there is a good agreement in substance, which is inoperative at law, by reason of a formal defect, Ch. will decree. e.g. case of the infant's sale. Sugden. 7 P. C. 243. 3 Atk. 607.

But where the agreement is ineffectual at law, by reason of the events not happening as provided for in the agreement, Ch. will not decree. e.g. ^{1st} ~~trust~~ covenants to settle & on death of his mother & his coming into poss. & he never comes into poss. agreement not decreed. 2 P. C. 17. 1148. 256.

Powell also seems to consider the rule "that where no dam. can be had at law no decree" to be universal so far as relates to the jurisdiction which enables Ch. to carry agreements into specific execution. The true ground he says of Ch.'s decreeing in such cases is founded on its appropriate jurisdiction over trusts & c. & accident e.g. obligor becoming exor. to obligee marrying obligee &c. 2 P. C. 254. 5.

If recovery of dam. at law be an adequate remedy, generally will not decree specific execution. 1 Atk. 28. 139. 2 P. C. 341. & Ch. will not generally decree the enforcement of contracts as putting party, party, for in such cases Ch. of law can give as complete remedy as Ch. can. & dam. are not to be assessed.

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satisfied by Chancery's conscience. But cases of this kind depend very much on their special circumstances. 1 Wils. 447. 2 Wils. 215. 2 Eq. Cas. 10. pl. 10. 1 P. W. 370. Bunt. 111.

And where the ends of justice require specific performance the party wishes it, Ch. will decree. As if a contract be to perform something relating to the personalty at several times. e.g. A. covenants to serve B. faithfully & to stand in his place, as to the performance of certain acts to a 3^d person. Decreed that A. perform "in specie". 2 Wils. 215. 2 P. W. 305. 2 Atk. 383. 1 Wils. 180. 1 Eq. Cas. 392. pl. 5. 1 Wils. 189.

So an agreement for 800 tons of iron to be paid for by instalments. So a sale of timber trees. 3 Atk. 380. 1 Eq. Cas. 393. ^{1 Wils. 180.} 1 Wils. 189.

Another exception to the general rule where fraud is mixed with damages. e.g. A. brings suit before at law. B. files a bill for injunction, for fraud. A. files cross bill for relief on the cov. If the cov. is established Ch. will treat an issue, & decree the damages. 2 Wils. 216. 1 Eq. Cas. at 17. 1 Bac. 526.

So if a bill is brought on a contract of a pers. nature, & def. does not demur to the relief, but files an answer. Ch. will decree for specific performance if admitted. 2 Wils. 216. 1 Atk. 11. Eq. 227.

If the agreement respects an interest in lands or stipulates some act in specie, Eq. will regularly decree a specific Execⁿ. Because damages are an inadequate remedy. 1 Bac. 526. 1 Font. 278. 104. 2 Wils. 219. 1 Font. 359. 1 P. W. 282.

If an agreement concerns the personalty on one side, & realty on the other Ch. will decree on a bill filed by either party. e.g. A. agrees to sell land, B. to pay for it, A. may have

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a decree for the money. In these ought to be mutual covenants
that recovers the whole purchase money. 2 Bos. C. 219.

A general covenant to convey lands of a certain value not
specifying them creates no specification therefore not decreed.
1 P. W. 480.

General rule: A person who demands specific execution ought to show
that he has performed or is willing to perform his part. If
he will not, or thro his own neglect cannot perform, he
is not entitled to a decree. 1 Font. 383. 16 L. J. 302. 1 Bos. 87. 2 Bos.
C. 19. Finch 445. Salt. 112.

General rule: When p^{ty} has performed in part on
his side & is prevented by subsequent events from performing
the rest, he shall not have a decree. For the agreement
must be decided on both sides & entirely, or not at all. e.g.
A agrees to pay \$1000 to B. within two years, B. marrying
his daughter & settling jointure. B. Marriage took place
but wife died within 2 years & no jointure settled. B. can
not have a decree for the \$1000. In an S^r Reversion case
he agreed to settle a manor on his wife & heirs & their heirs
is & certain pensions. He settled the manor, but before
he appointed the pensions his lady died without issue.
His father was to pay S^r F. m. £3500 per ann. S^r F. lost
his bill not decreed. 2 Bos. C. 19. 1 Font. 383. 16 L. J. 302.
16 L. J. 302. Finch 445. 2 Frow. 85. Skin. 287.

Exceptions: where p^{ty} after performing in part (and
is not in statu quo). Here he may have a
decree. e.g. where an agreement between freighters & owners
it is stipulated that freight shall be paid only on the

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homen and bound passage & the freighter have no access
board. plff. having performed in part, shall have freight
decree. 2 Ben. C. 260. 1 Ry. Cas. 72. 1 Sm. L. 386. 2 Warr. 210. 1 Felt. 217. 2 Ry. C. 212.

But if plff. has been willing to perform & has been prevented by fault, his readiness to perform is equivalent to actual performance in Eq. & at Law. 1 Salk. 112. 7 H. 88. 2 H. 11. 312. 4. 1 E. 201.

Chy. will not decree over a written agreement which has been afterwards discharged in part. 1 Bulling. 10. 1 Ry. C. 212. 1 Warr. 242. 1 Bro. C. 280. 2 Atk. 58. 220. 3 W. 40. 1 Bro. L. 23. 328. 2 Bro. 299. 1 Felt. 240.

So where an agreement has not been insisted for many years no decree unless that delay is explained by special circumstances. So if agreement was upon mortgage to purchase & settle lands within 3 years & covenant has been in breach, & needed his money, or by reason of other circumstances C. not spare it. This is not a bar, but affords evidence of a waiver or release. 2 Warr. 269. 84. 2 Ben. C. 260. 1 Felt. 321. 1 Atk. 610. 1 Felt. 384. 5 Warr. 334. 1 Gallos 2. 2 F. W. 87. 1 Felt. 326.

But no length of time will prevent Eq. from relieving in fraud - nor affect a trust. 1 Felt. 322. 1 Warr. 186.

But plff. omission to perform his part, precludes at the time fixed is no objection to his having a decree. Said this rule is lately altered. 1 Felt. 384. 1 Atk. 12. 4 Bro. Th. 329. 1 East. 627.

If plff. has trifled, or shown a backwardness, or -
form his part, no decree in his favor - especially if circumstances are altered. 2 Ben. C. 260. 1 Bro. 222. 5 Warr. 338.

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Difference between marr: agreements, and others.

11 In the former the children being purchasers, may com-
pely perform a part of one part, tho the other has failed. The
same principle in favor of a wife under marriage ar-
ticles, to which she was not a party. She has performed
her part by marrying. v. Bur. 26. 7 Finch 445. 1205 377. 8.

If after an agreement, made a Stat. intervenes rendering complete performance impossible, partial performance will be decreed, at discretion by the party claiming. e.g. agreement to mine a lode for 40 years - Stat. prohibits longer lease than for 10 years - lease for 10 decreed. By Wes. & Felt. 20, 21.
2 Cas. C. St. 3 Mo. (C. C. 339.

So if complete performance is prevented by accident
or the act of God, it seems 2. Pow. C. 37, H. 448, 1. Pow. 284, Reg. Cal. 8. 3. Br. P.C. 354.

Doctrine of cy pres obtains in many cases at Law. Co. L.
352. 219. 62 Bl. 6731. 27 E. 254. 2 H. Bl. 581. 163

This doctrine seems at first view to contradict this rule of law in Salk. That, where a Stat. renders the performance of a Court unlawful, Court is repealed. But the Stat. makes the Court void only as far as it performs an act unlawful. Salk 198.

So where one has a power to lease for 10 years & leases
in 20 years, the lease will be good in Eq. for 10 years. not
at Law it seems. 12th. 40. 17th. 212. 20th. 478. 21st. 2252.

[illegible]

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Art. or articles to settle lands on A for life & yet supra
Chy. will decree a settlement on A for life only rem. in strict
settlement upon the first & other children in tail. 2 Pow. C. 46.
1 Eq. C. ab. 392. 2 Vern. 658. 2 P. W. 344. 3 Br. P. C. 327. Mos. 238. 1 Font. 399. 1 Br. P. C. 470.
1 P. W. 522. 3 Atk. 293.

Decree the same, the settlement is made, after marriage,
giving A. an Estate, tail. Decree will go according to the ar-
ticles. 3 Atk. 293. Talb. 176. 2 P. W. 376. 2. 2 Pow. C. 42.

So if the settlement is made before marriage but expressed to
be in pursuance of the articles. 1 P. W. 123. 2 Vern. 658. 2 P. W. 349.
2 Pow. C. 42. t. Mos. 238. 3 Br. P. C. 327.

These rules in favor of issue, said not to extend to fe-
male issue. 2 P. W. 349. 359. 3 Atk. 371. 2 P. W. 356. 3 Br. P. C. 327.

But if a settlement has been executed before marriage giving
A. an estate tail, & not expressed "in pursuance of the ar-
ticles" settlement must stand. a new agreement is pre-
sumed. Talb. 20. 2 Pow. C. 46. 2 P. W. 356. n.

Qu. whether the issue can be relieved v. honest purch-
asers? No. adjudged otherwise v. Creditors. 2 Pow. C. 46. 60. 3 Atk.
291. 2 Pow. C. 47. 58. 60. Pre Ch. 425.

Chy. considers Execy. agreements as executed from y. time
at which they ought to be executed - this is the time of mar-
rying the agreement, unless another is fixed. 2 Pow. C. 56. 1 Font. 350.
413 t. 2 Vern. 639. 1 P. W. 716. Rob. F. C. 665. 7.

But the vendor is consid^{ed} as trustee for the vendee, & his
rep^s are equally bound. 2 Pow. C. 58.

Therefore money articulated or devised to be laid out
in land, will be considered as land from the time of the

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contract & go to the heir, tho never actually laid out.
 2 Pow. C. 83. 1 Font. 413. &c. 3 W. 532. 483. 3 H. 211. 2 W. 171. Salk. 154. R.
 Ch. 543. 2 Atk 307. 2 Vern. 536. 1 Ves. 175. 196. (Rob. 7. C. 665. 7.

Money thus articulated is subject to courtesy off^r husb^d
 i.e. it shall be laid out in land, which shall be settled
 on him for life or he shall have the interest off^r money
 for life not subject however to the dower off^r wife.
 1 Font. 414. 2 Vern. 536. 585.

It will pass by a devise of land or real Estate. R. Ch.
 320. 2 Pow C. 109. 2 Vern 679. 1 W. 172. 3 Atk 254.

General rule: It will not pass by a general be-
 quest to a Legatee. post. 3 W. 221. 2 Pow C. 112.

These rules hold, whether the money consists of a par-
 ticular fund in the hands of trustees, or of the owner.
 or mixed with his general funds. 2 Pow. C. 86. 7.

But Eq. will not consider money as land in these
 cases, unless the agreement to lay it out &c. is positive.
 as "to remain in the hands of A. till a purchase can
 be made" &c. is not express enough. 1 Font. 414. 2 Vern 227.
 3 Atk. 255. 2 Pow C. 84.

So if money is agreed to be invested in lands or
 securities &c. at the election of a party, the election must
 be made - Since, it remains money. 3 Atk. 256. Vern 298.

So land articulated to be sold, treated as money, accord-
 g to the foregoing rules taken & converso. 2 Ves. 639. 40. Salk.
 154. 1 Font. 414. 2 Pow. C. 83.

Upon this general principle in Eq. if considering as
 done what ought &c. & that the property is transferred from

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from the time of the agreement made, it is holden that the vendee under the articles shall be liable (and so being in no default) to all contingencies happening to the property between the agreement & the time fixed for the conveyance. As in case of an East India stock in Jamaica. This case is said to be misreported. But the doctrine seems to be established. See a case of mortgage - the thing originally articulated to be sold was a bubble. 2 Pow. 81. 2 Vern. 280. 2 P. C. 840. 2 C. 10. 411. 1 C. 10. 81. 1 Br. 66. 156. Contra 2 C. 10. 217. 1 H. 151.

A case was put, in which Covenants w^d not have a decree, but the payment in the case put was to be on a conveyance, & accident had prevented a conveyance.

There was an agreement to purchase a lease for 3 lives & to take conveyance at a day fixed. before the day one life dropped. So was borne by the purchasers. 2 P. C. 85. 1 C. 10. 661.

But if the contract is not an agreement for a sale but for a future agreement for that purpose, the property is not changed in eq. It is little more than agreeing that one shall have the privilege of pre-emption. 2 P. C. 79.

But the money articulated (ut supra) is prima facie consid^d as land, yet one who is tenant in fee simple of it may at his election treat it as money, & have it retained as such. There are no 3^d persons, who are purchasers under the articles - no injury to others. 2 P. C. 112. 1 H. 413. Rob. F. C. 667. n. 2. Vern. 295.

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But to make it consid^d as money, he must show such election, that it sh^d be so consid^d. e.g. Declaring in a will that it shall go to his exors. or describing it as so much money, agreed to be laid out in land. Then it will pass without the solemnities of a devise, 28 W. 145. 3 P.W. 221. note C. 3 Atk. 256. 254 W. 1 P.W. Ch. 222. 238.

And parol proof of facts, or even declarations of the testator (the tenant in fee.) is admitted to show his election or intent. as the fact of his having received part of the money & appropriated to other uses. So parol of his declar^d that he considers it as money. This is rebutting an Equity. 2 P.W. C. 114. 75. 1 P.W. 483. 2 W. 174.

Want of mutuality in an agreement is a decisive objection to a decree for a specific execution. It is uncertainty. e.g. A. agrees to sell to B. a manor for £. 1500 less than any other purchaser w^d give, & B. was not bound to take it - uncertain & not mutual. 2 P.W. C. 233. 4. 2 Burr. 415. 1 Eq. C. ab. 20. 7.

But if it was originally mutual, no subsequent want of mutuality is an objection to a decree, Cases ante. of the destruction of the subject, agreement to pay £920 per An. for stock, which afterwards fell to, par. So an agreement for the sale of an estate for an annuity. The annuitant dies before the first payment. but a conveyance is decreed. 2 P.W. C. 232. 4. 2 Br. P.C. 415. 1 Atk. 10. 1 Br. Ch. 156.

Penalties must be waived by plff. in Eq. or the bill is demurrable. For if Debt. were obliged to answer without waiver, plff. w^d resort to C. L. 2 P.W. C. 204. 7. 1 Burr. 60.

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Generally Chy. will not suffer advantage to be taken of penalty or forfeiture, when the substance of the contract may be obtained without it. (i.e. relieves v. it.) e.g. Interest on a mortgage sp. Ct. with a clause of increase v. 2 Bos. L. 204. 2 Br. Ch. 341. 1 Bos. C. 171. 2 Vern. 316. 289. 4 Bos. 228. 93. Ack. 520. 2 Br. C. 341.

When therefore compensation can be made accordg. to a clear rule of dam^s the substance of the agreement can be obtained. 2 Bos. C. 205.

But where there is no rule of dam^s Chy. cannot relieve v. the penalty &c. e.g. Leases covenants not to alienate without license of L^{or}. under penalty of forfeit. ing the Leases. Here as the substance is not obtained without it, there being no rule of dam^s penalty is not relievable ag^t. 2 Bos. C. 205. Mod. 112. 3.

So, tho there is a rule of dam^s, yet if by reason of intervening events, no compensation can be made as a substitute for the penalty. e.g. A. in his marr^d articles covenants that if he does not settle such a jointure within 2 years, he sh^d lose all his wife's portion, except the ^{int^{est}} interest. wife died before jointure settled, within 2 years. Forfeiture must issue, tho the amount of the jointure is known. For the wife being dead no compensation c^d be made. 2 Bos. C. 205. 7. 1 Vern. 88. 9. 1 Fort. 387.

Wherever one party to an agreement voluntarily stipulates an advantage or favor to the other, on certain conditions, the latter must lose the advantage &c. unless he strictly complies with the conditions, the penal is effect. e.g. a creditor offers to take less than

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his debt, if paid at a certain day - Payment must be made precisely at the day, or debtor must pay $\frac{1}{2}$ whole.
2 Pou. C. 210. 1 Burr 220. 456. Barnard. 481. Pre Ch. 160.

Gen. Rule: - When Eq. will relieve v. a penalty in an agreement it will enforce perform^{ce} of agreement itself, & vice versa. 1 Font. 141. &c.

Formerly holden that where there was a penalty in an agreement the party bound had his election in all cases to do the thing or pay the penalty. 2 Pou. C. 136. 1 Font. 141.

Present Rules. When the penalty of a bond &c. appears to be merely a security for the perform^{ce} of something collateral, so that the enjoyment of the collateral object appears to have been the thing intended to be secured, Chy. will relieve v. the penalty, & enforce perform^{ce}. 1 Font. 141. 1 Bro. Ch. 418. 3 Mac 691. 11 Pow. C. 171. Jac. Dict. "Penalty."

2d. if there is no rule of dam^t. or no compensation -
E.g. a bond, mortgage &c. Doug. 431.

This is done by injunction generally, or payment of principal interest, & as the case may be Costs.

But in these cases Chy. will decree specific perform^{ce} of the collateral thing, for the obligor in this case has not his election to do one thing or the other. 2 Pou. 136. &c. Stra. 533. 2 P. W. 191. 10 Mod 517. 2 Ves. 528. 2 Atk 371. 4 Burr. 2228.

When the sum to be paid on non perform^{ce} is in the nature of a fixed damages, Chy. will not relieve v. it, tho there be a rule of dam^t. Here $\frac{1}{2}$ penalty is not intended as a mere security for another thing (ut sup^a) but as a compensation for the loss of it. 1 Font. 142. 4 Burr 2228. 9 Br. P. C. 417. 470.

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In this case Chy. will not decree performance of the cov.^t nor generally restrain its violation, for the obligor has his election to do so or to pay the dam^t. asse^d. E.g. *Super* covenants to pay "£5. for every acre of meadow plowed." *Deus of Covenant* "not to plow" under a penalty. 1 *Forb.* 142. 2 *Vern.* 119. 2 *W.L.* 32. 3 *Bac.* 178. n. 4 *Bur* 2228 q. 176. *Bl.* 227. 232.

But when the penalty is a mere security for a collateral thing, & not a compensation for it, the obligor has no election in Chy. (ut supra).

The election is (after the breach) in the obligee. Therefore (ut supra) Chy. will decree specific performance. 1 *Forb.* 142. 2 *Vern.* 528.

Whether the sum to be paid is strictly a penalty, or compensation, depends on the construction of the whole instrument.

Now by Stat. 8. & 9. *W.* 3. & 4. & 5. *Ann.*, Cts. of Law are enabled to chancery penalties in certain cases. So in *Corn.* 1 *Bac.* 544. 2 *W.* 691. 3 *W.* 130 arg^t. *Coul.* 357 *Laws* pl. 256. 2 *Bl.* 341. *St.* 27.

In Eng. if an agreement on which sc. is denied in Chy. & proved by one witness only, an issue at law is directed, & the case retained on the E.g. reserved. Chy. will in this case retain the bill, tho on a personal contract, the relief not being deferred to. 1 *Pow.* M. 254. 5. 7. *W.* 667. *Ep.* 730. *Bull.* 235. 2 *Pow.* 216.

When Chy. relieves v. penalties of bonds for performance of covenants &c. it frequently ascertains the dam^t by directing an issue quantum damnificatus at law & decrees according to the verdict. 2 *Corn.* 2214. 1 *Sid.* 442.

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Sitting aside Agreements.

Chy. will sometimes refuse to decree specific execution of an agreement v. which it w^d. not grant relief. e.g. an unreasonable agreement. not attended with fraud. for mere unreasonableness is not sufficient ground to sit aside contracts. 2 Pow. C. 143. 225 & How. P. C. 20. 2 Pow. C. 228. & 182. 158. 200. 5 Vin. ab. 549. 1 Eq. C. ab. 587. pt. 9.

It is for Chy. discretionary in some measure - to decree or not. 2 Pow. C. 177. 8. 221. 259.

But fraud in the transaction is good ground for sitting aside an agreement. 2 Pow. C. 145. 2 C. W. 203. 3 W. 290. Rob. F. C. 526. 532. Kirb. 356. (the unreasonableness may be on circumstances to evidence fraud. 2 Atk. 324. 11 W. 627. 4 Br. P. C. 557.

Agreements obtained by imposed hardship & oppression (a kind of eq. distinct from fraud i.e. deceit) sit aside in Chy. e.g. an agreement in a mortgage that if interest be not paid at the day, it shall become the principal. But such agreements afterwards ratified freely "with his eyes open" are not set aside. So of those obtained thro fear &c. 2 Pow. C. 145. 188. 163. Talb. 41. 2 Sulst. 449. 2 W. 152. C. W. 77. 3 W. 294 m.

Where the oppressive agreement is unlawful. Chy. will a fortiori relieve v. it. e.g. to pay usury. There the debtor is not considered as participes criminis. 2 Pow. C. 148. Talb. 38.

But where both parties are equally guilty Chy. is neutral. "volenti non fit injuria. e.g. one loses at gaming & pays the money. Chy. here will not relieve. & the express provisions of positive law. "in pari delicto" can't 200. 2 Pow. C. 103. Talb. 41. 1 East 108.

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Any unfairness in the plff. will prevent a decree in his favor. He must have "clean hands". e.g. misrepresentation as to the value of the subject matter. So where the plff. pretended to be a purchaser for Defts. brother, when he was not, & thus obtained an agreement of sale at an under value. 2 Pow. C. 221. b. 3 Atk. 383. over 227. 7.

So a Suppression veri to the disadvantage of Def. prevents a decree for plff. e.g. Rice to compel the Def. to complete a purchase of an estate represented as yielding a rent of £40, & no notice given of an annual repair (needed.) 2 Pow. C. 222. 1 Br. Ch. 440. Pre Ch. 539. 5 Vin. 553. (Rob. 7. C. 524. 5. 8. 530. 1.

So in some cases where there is misconception, without any deceit or unfairness. as where an agent for sale of an estate, sold at an under value, from a mistake as to quantity of interest, (the est. being freehold & sold for leasehold) & in some other particulars. Case of a Schoolmaster. 2 Pow. C. 225. 2 Br. Ch. 326. 2 Pow. C. 196.

Rule is that if the fact misconceived is the cause of the agreement it is set aside. Thus if the mistake is not a *sine qua non* to the agreement. Schoolmasters opinion. 2 Pow. C. 196. 1 Ves. 400. Mosely 384.

General rule, that voluntary agreements or covenants under seal are not decreed in Chy. for here only nominal damt. are recovered at law even in case of a Covenant. (Exception supra) 2 Pow. C. 241. 2 H. 2428. 1 Atk. 10. 1 Stu. 733.

But the compromise of a doubtful right is sufficient consideration. 1 Atk. 10. 1 Plow. 726. 2 Pow. C. 200. 1. 4. 1 Pow. C. 142.

Different from the case of a mistake, which is a *sine qua*

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year non of the agreement. Here the parties are apprised of the doubt, & make a contract of hazard intentionally.
2 Atk. 587. 592.

Parol contracts, respecting lands are decreed in Chy. if partly executed. See Stat. Frauds & Perj. tit. "Contracts" p. 10 Pow. C. 428. 5 Vin. 522. 2 Eq. C. ab. 48. 16.

So in case of private trusts, provable from circumstantial facts. (See St. Tr. & P.) Pow. M. 55. 119. 2 Pow. C. 257. 2 Vern. 288. Talb. 65. R. Ch. 520. 2 Atk 71. Ct. of C. in Com. 1799. contra.

Agreements obtained by coercion, not amounting to duress, are not decreed, but set aside. 10 P. W. 118.

So from undue influence - e.g. that intended husband sh^d release to wife's guardian all accounts of money profits of the wife's estate. Not so in case of fear arising from a just reverence or respect - as in a child towards a parent, if the agreement be reasonable. 2 Pow. C. 187. 160. 2. 264. 12 Vis. 19. 1 Atk 11. 1 P. W. 639. 1 Br. Ch. 369.

Intoxication is not suff^t cause for vacating an agreement in Chy. unless effected by the other party, or unless some unfair advantage is taken. 10 Pow. C. 29. 12 Vis. 19. 3 P. W. 130. n.

So weakness of mind, if the party be legally compos mentis, is, per se, no ground for setting aside his agreements. Unless attended with fraud or any suspicious circumstances. Case of a young nobleman entrusted to a servant, who was to guard him from imposition, & yet procured from him a bond for £1000. 1 Pow. C. 30. d. 3 P. W. 129.

Contracts are sometimes enforced in Chy. v. Infants, who

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the not valid at law. The Chan^y acts as Guardian. s.g.
If money is borrowed by an infant, & actually expended in
necessaries. 2 Pou. C. 258. 10 W. 558. q. 5. Mod 368. Salk 307. 1 Font. 68.

So in other cases where the contract is clearly for
the infants benefit. 2 Pou. C. 258. q. 1 Font 68. q.

Agreements operating as a fraud on 3^d persons are
never decreed but set aside. 2 Pou. C. 165. 176. 1 Eq. C. ab. 88. Salk.
156. 1 Burr 348. 412. 475. 2 Ves. 375. 1 Pou. 185. 506 7 C. 538. q.

Not now good at Law. 4 T. R. 166. 176. 18 C. 322. 65 67. 2 T. R. 763. 1 B. 40.
75. 285. - They cannot be ratified by the parties, being void -
(see contracts subject of) 1 Burr 602. 475. 10 W. 496. 3 W. 75. n.

So marriage brokerage bonds. Qu. are they good at Law?
Such cont. are unlawful. 1 Burr 474. 5. 1 Font 245. 6. 1 Pou. C. 174. 195.

Contracts with heirs apparent for their expectancies
are always vacated in Chy. - formerly not set aside unless
the terms were disadvantageous to the heir. The rule holds
whether the heir is an infant or not. 2 Pou. C. 181. 6. 2 Burr.
14. 27. 1 Font. 123. 4. 1 Burr 75. 167. 10 W. 310. 3 W. 292. 2 Ves. 125.

They are set aside tho afterwards executed in some
cases, & tho executed in obedience to a former decree, or favor
of the agreement. 2 Pou. C. 183. 30 W. 292. n. 2 Burr. 14.

Rule: - if the original contract is shown to have been
fair, & is ratified freely on full information, it is good -
otherwise the ratification is not good - Qu. are these conts
void at Law. 2 Pou. C. 184. 8. 2 Ves. 159. 1 Wils. 320. 10 W. 320.

Evidence of a title decreed in Chy. is to be delivered
up. q. Mod 297. 1 Burr 479. 80. 2 Atk 307.

Agreements to do a thing which would tend to

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of prebends, or tithes, or immorality, are not decreed. 2 Bouv. c. 259. 1 H. 183. 2 Ves. 238.

A set off is decreed in Chy. So allowed in Eq. under Stat. 2. & 3. Geo. II. 3 Bl. 309. 4 Ld. 113. 6 H. 456. 2 H. 440. 1 H. 657. Comf 56.

In Com. original petitions in Eq. are to be brought before a general assembly of the demand & pec. 25 § 5335. To the Supreme Ct. above § 335. The alleged value determines if uncertain. St. c. 130. 2 Root 42.

No appeal from decrees in Chy. but in Com. writs of Error lie as at C. Lau.

Of the power of Chy. to issue Injunctions.

Injunction is a prohibitory writ restraining a person from doing a thing which appears to be against equity & conscience. 3 Bac. 172.

They issue in various cases. The most usual injunction is to stay proceedings at law, on the ground of equitable circumstances, not adverted to in Ct. of L. 3 Bac. 173.

If a declaration is filed in Eq. execution only is stayed. if not, all proceedings are stayed till answer or further order. 3 Bac. 173. 2 Com. B. 46. 1000 25. 329.

If a winner at gaming brings a suit at law for recovery of money won, & having been in the winners possession & forcibly taken from him by the losers, Chy. will issue an injunction. 1000 489. 2 H. 71. 3 Bac. 172.

Chy. cannot issue an injunction to stay proceedings in a criminal case in Kings bench - but if did Kings bench would protect any one who sh^d. proceed in contempt of it. 3 Bac. 173. 6 Mod 16.

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Injunctions to stay waste, as for cutting timber trees, plowing ancient meadow, &c. in favor of a reversioner, or tenant for life or years, is granted. So in favor of a reversioner. 1 Br. Ch. 57. 2 Com. 50. 13 B.C. 227. 408. 3 B.C. 172. 1 Amb. 29. 30. 1 H. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

Injunctions to stay waste will issue in all cases in which the action of waste w^d lie at C. S. & in many others. e.g. action of waste lies only in favor of the immediate reversioner, or tenant for life, or years, or reversioner, having the inheritance; injunction issues in favor of a distant reversioner. 7 B.C. 217. 1 Burr 23. 3. 4 B.C. 94. 720. 1 Term 450.

So it goes v. mortgagor even in fee in possession for cutting timber, if he does not apply the avails in sinking the debt. So v. mortgagor in possession. 3 B.C. 723. 2 Com. 51. 1 Cow. 11. 75.

If a tenant for life without impeachment of waste pull down the buildings, an injunction issues: tho it does not for his cutting timber. 1 Burr 22. 2 B.C. 728. 1 Amb. 107. 2 Com. 52. 51. 1 Salk 161. 2 Show. 59. 2 Br. Ch. 89.

So in the last case the tenant is decreed to repair the buildings injured. 2 Burr 728. 2 B.C. 454. 1 Eq. C. at. 400.

So an injunction will issue v. such a tenant in some other cases. As to restrain his cutting trees intended for ornaments &c. 3 B.C. 215. 10 B.C. 264. 2 Com. 51.

It sometimes issues v. one having the inheritance, as a trustee. 2 Com. 51.

Action of waste lies not v. tenant in tail after possibility, &c. but an injunction will go v. him if the waste is very unreasonable. 1 Eq. C. at. 221. 2 Com. 50.

So an injunction issues to restrain nuisances. e.g. to stop a building obstructing ancient lights. 2 Com. 50. 2 Burr 452. 1 Burr 543. But

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But the right must be founded on prescription - or if, they are, not ancient, on an agreement. 2 Ves. 452. 1 Forb. 29. 2 P.W. 266.

It goes to stop a building on another's ground. 3 Bac. 174. 1 Forb. 29.

But the nuisance must be such as the C. S. deems a nuisance - therefore it goes not. v. the building of a house for the small pox, & 2 Roll. 139. 40. 2 Atk. 750.

It does not issue to restrain common trespasses - but if, so long continued as to become a nuisance, it does issue. 2 Com. 52. 2 Atk. 21.

It does in some cases v. one suing for a penalty at Law. 3 Bac. 691.

In Com. Cts. of Law Chancery. So now in Eng. by Stat.

Injunctions sometimes issue to stay trials at Law, as where it appears that p'ss E.g. must arise out of d'f's answer. 3 Bac. 174. 2 Ch. Ca. 66. 76. 93.

So injunctions are granted to establish the prevailing party's title when he is harassed by different suits & judgment reversed in the House of Lords. 1 Ch. 261. cont. 1 Br. P.C. 266.

This is a perpetual injunction to prevent vexation. 3 Bl. 438. 9. 11 Ann 308. Stat. 404. 1 P.W. 671.

So in some other cases injunctions issue to quiet a person in the possession of his estate - as where he has a plain equitable title, & has been in possⁿ several years &c. Bacon says that it is now very often granted. E.g. a trustee agrees to sell to A. & cistuy que trust does sell to B. - Then the trustee disturbs B's possⁿ which he has had several years. 11 Ann 156. 3 Bac. 174. 2 Atk. 282.

Injunctions also issue (in other cases than those of quiet) to prevent a multiplicity of suits - as where many suits are

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depending, or likely to happen from the same thing. e.g. several
ten^{ts} of assurance claim the profits of a fair. To settle bounda-
ries of land &c. *Milf* 4. 104. 127. 8 *Bac*. 174. 1 *Warr* 22. 206. 308. *R. Ch.* 261.
1. *Ask* 282. 2 *Id* 484. 3 *Id* 438. 9. *Chan.* 10. 17.

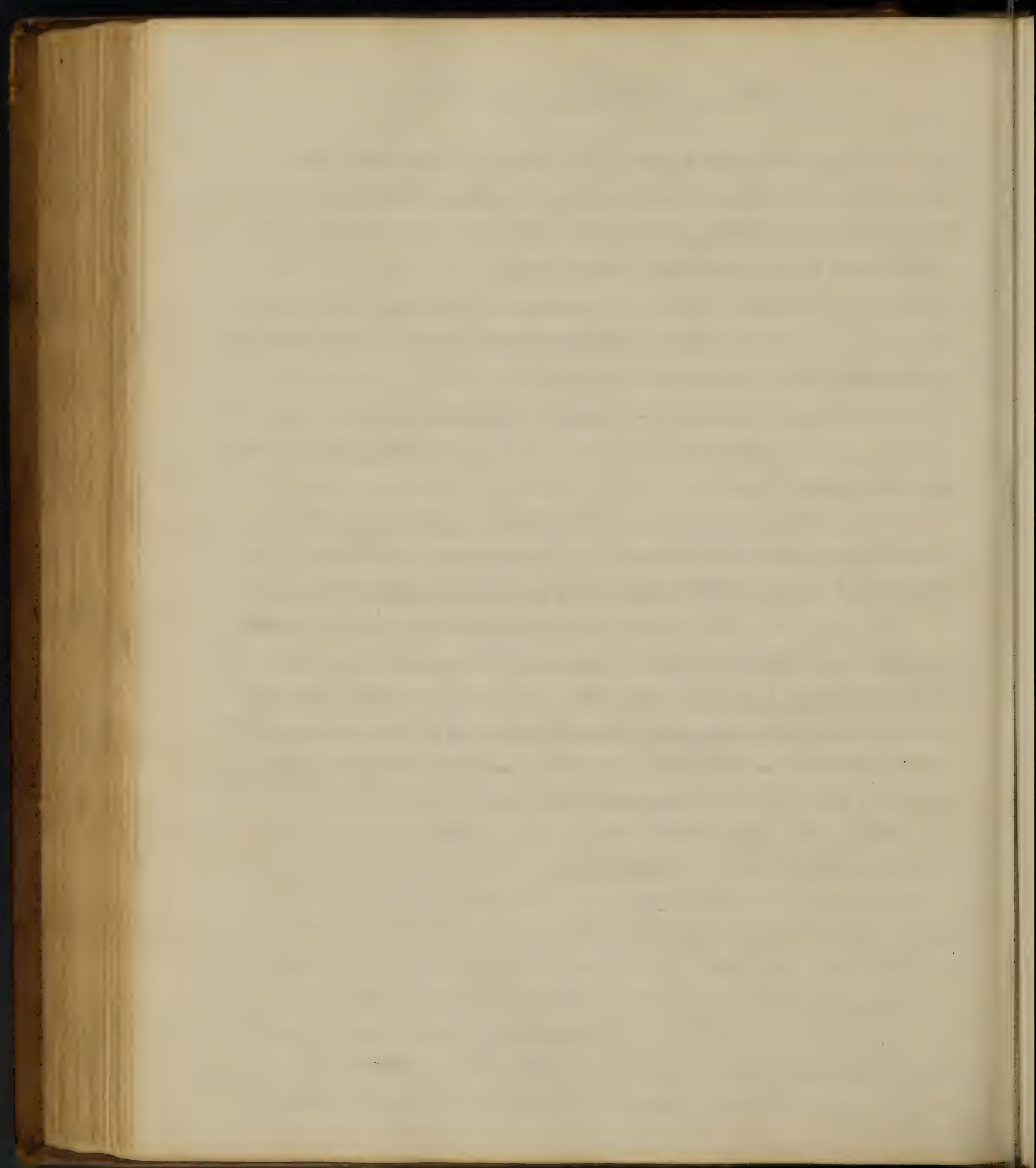
To pendents etc. between persons claiming to be exc^{ts}
d^o an injunction issues to prevent either from acting as such.
2 *Bac*. 410. *Sid*. 179. 1 *Warr*. 882. 5 *Hay* 98.

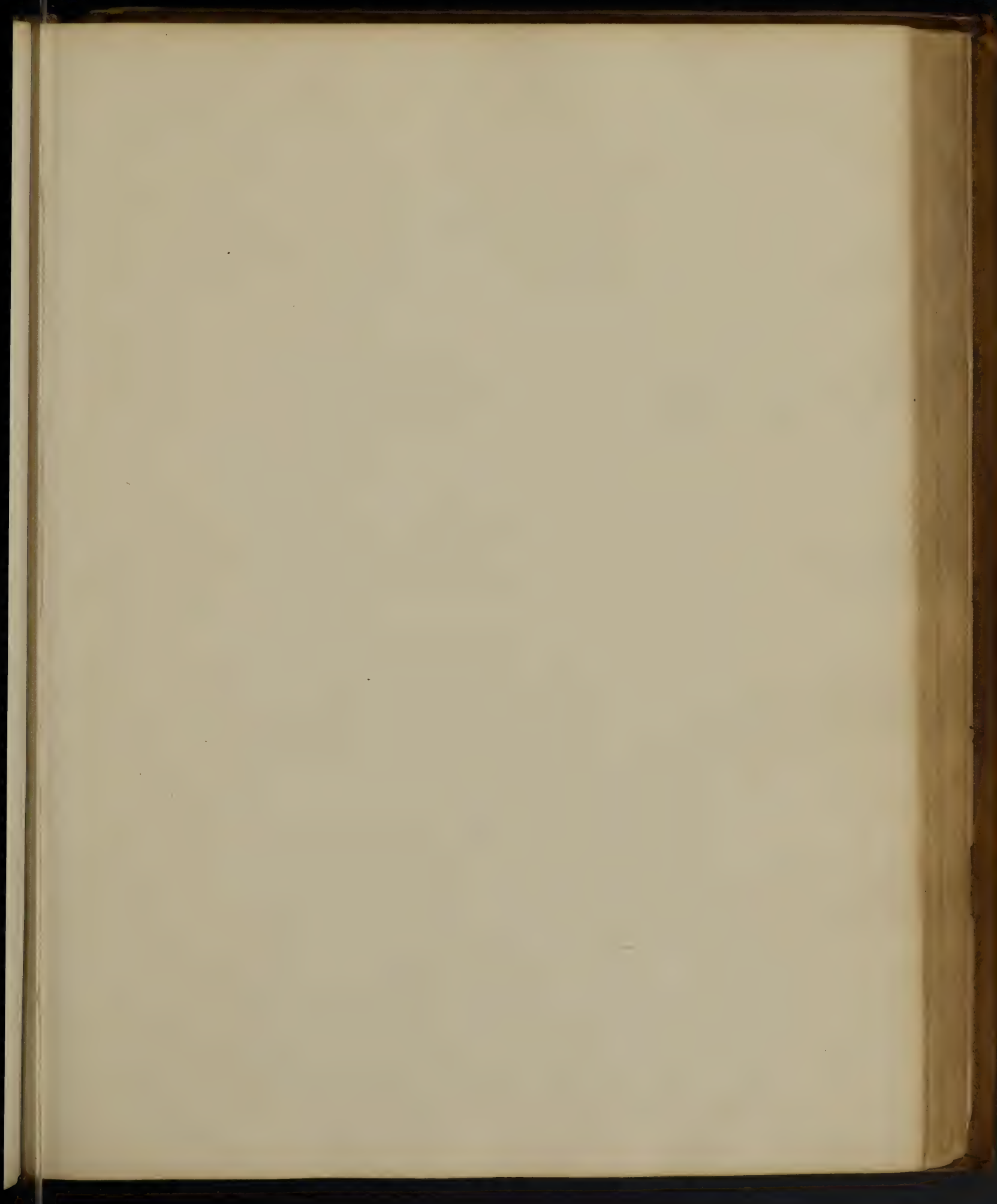
As Chy. will relieve v. fraud so it will issue an injunction
on suggestion of fraud to stay proceedings at Law, provisionally -
2 *Com*. 48. *Warr*. 483.

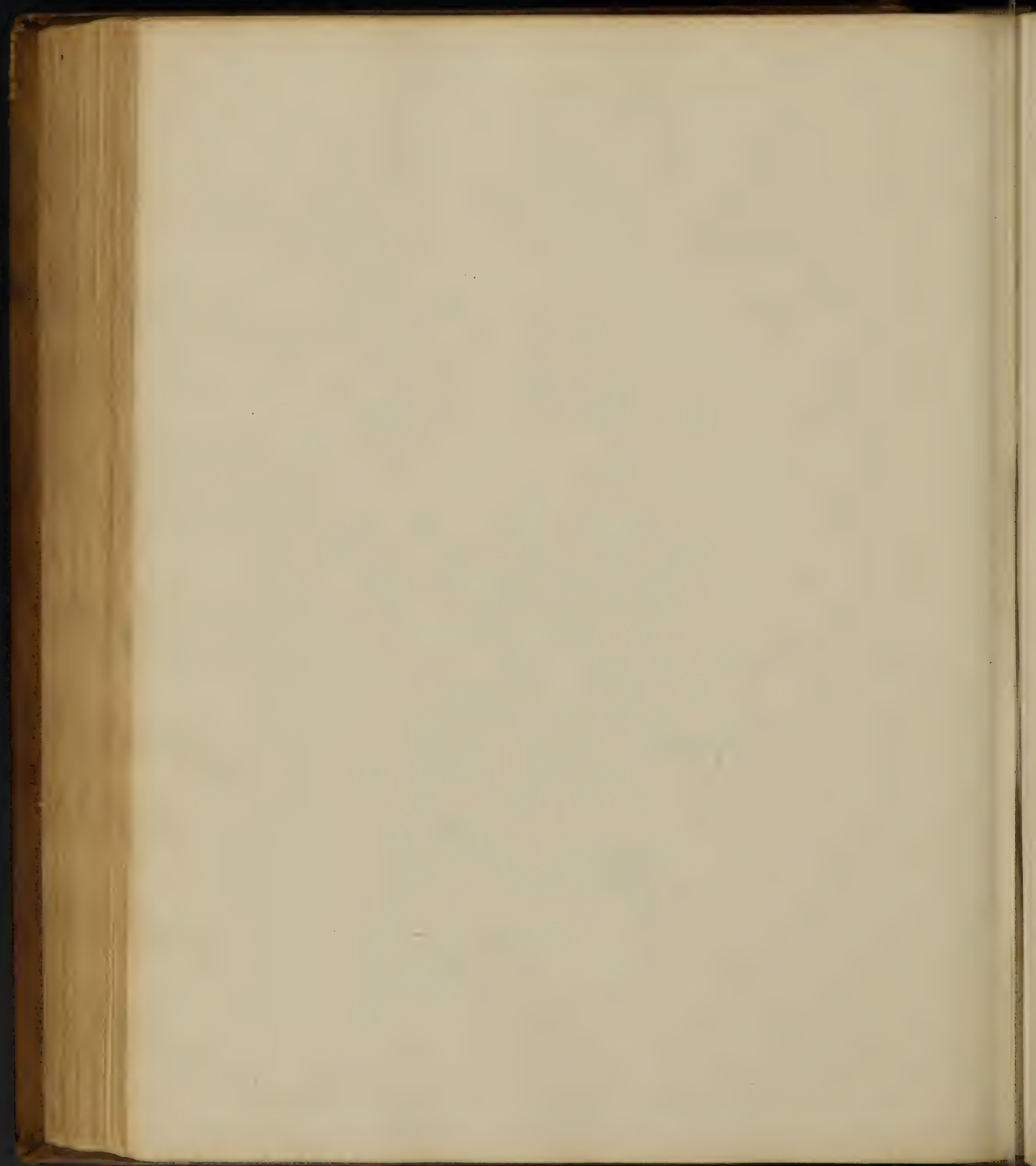
Injunctions in favour of authors restraining others from
publishing their works were frequent before the Stat. of ann.
2 *amb* 166. 1 *Warr*. 30. *Milf* 121. *Warr* 120. 2275. 41 *Bur* 2802. 2399. 2400. 2409. 2417.

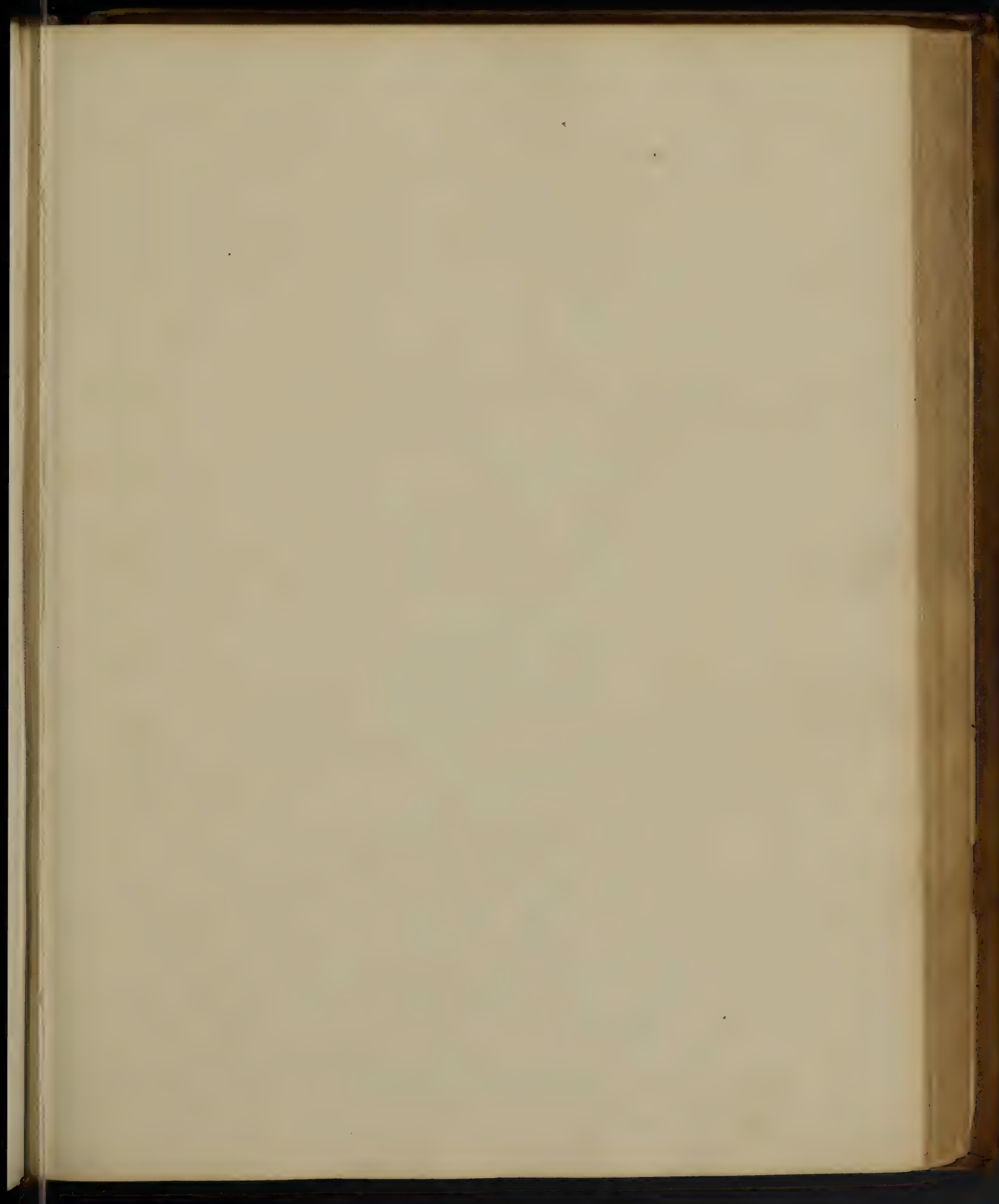
Decision in *Born. Proc.* was 1st. That at C. L. an author
had the sole right of first printing & might maintain an
action t^e by 3 judges & d^o *Mansf* 148 2 - 2nd. That the C. L.
action is taken away by Stat. of ann. 6. to 5 - But d^o *M.*
was with the 5 - 3rd. That printing did not take away his
right 7. to 4. d^o *id.* was with the 7.

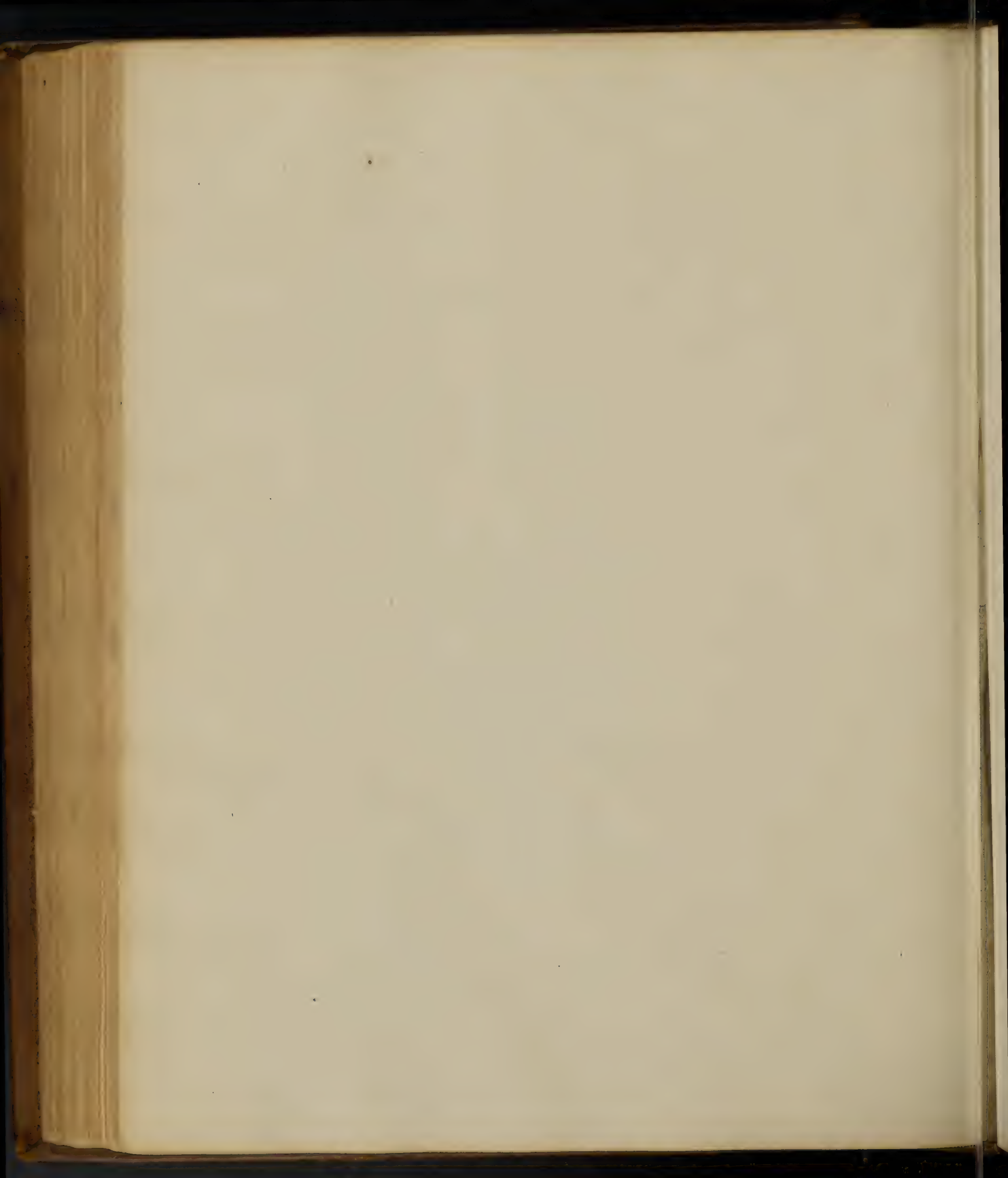
How far Eq. will relieve v. a judgt. at Law, see
Com. & Chy. J. W. 3 *Ask* 223 p. 1.

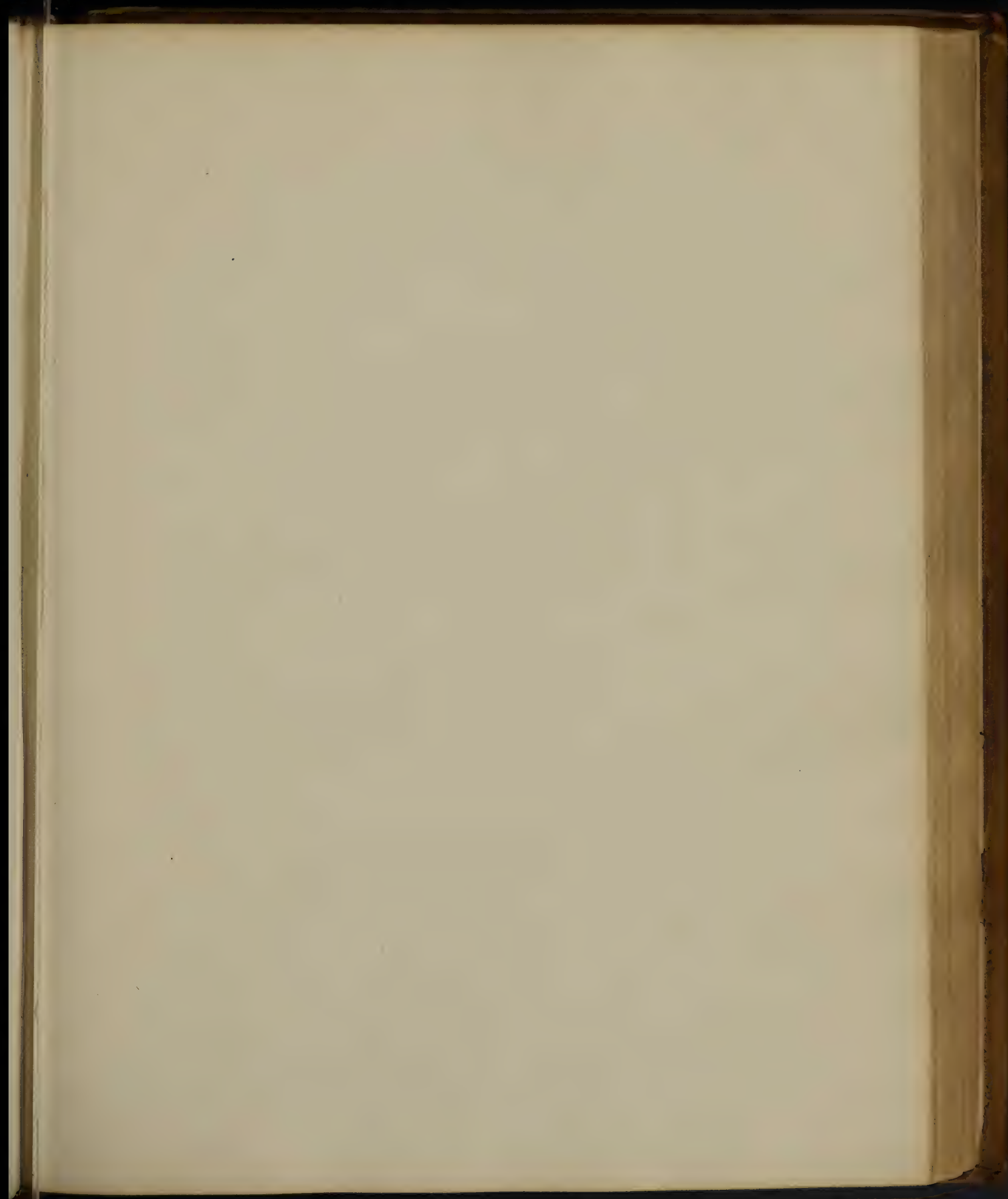


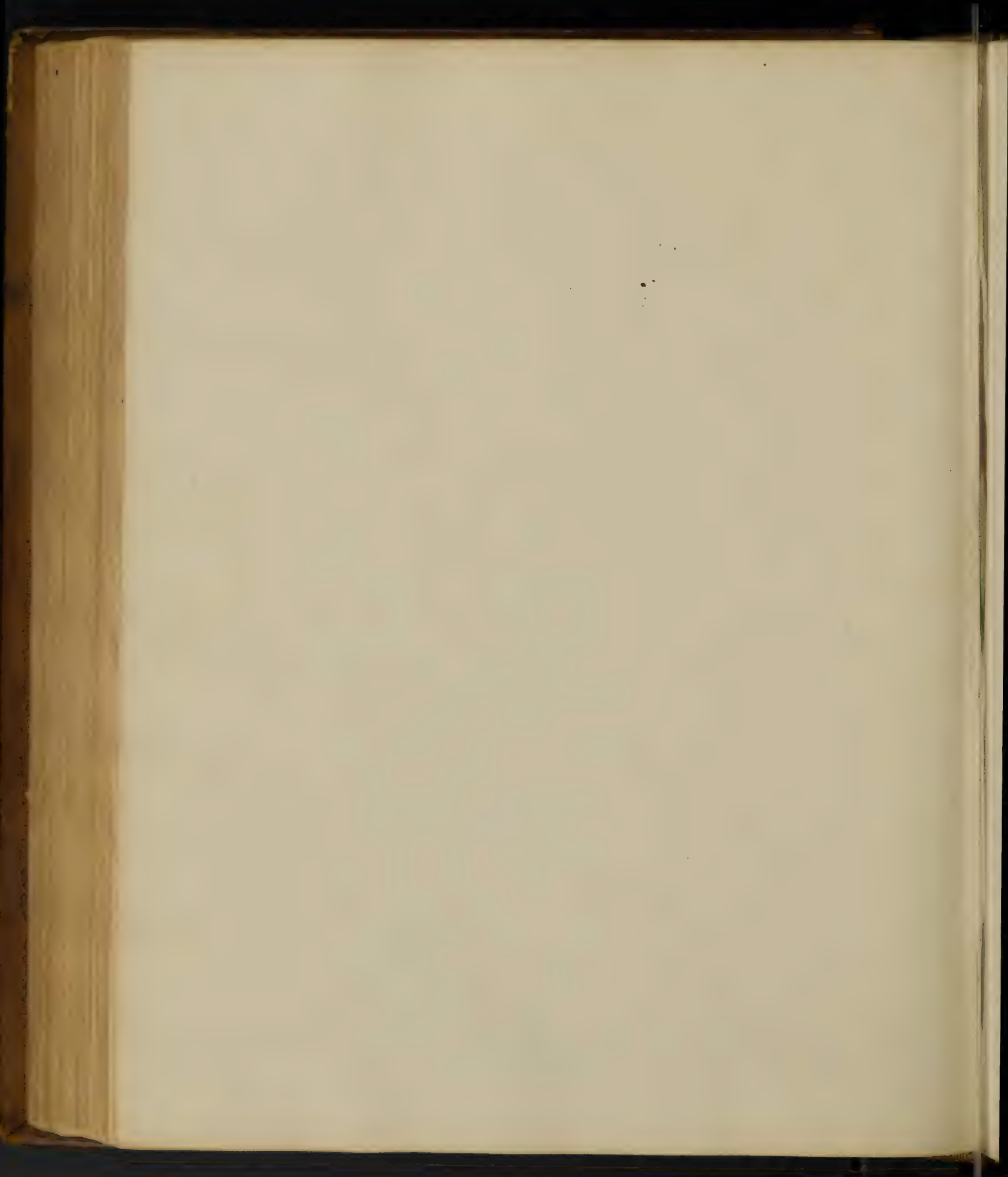


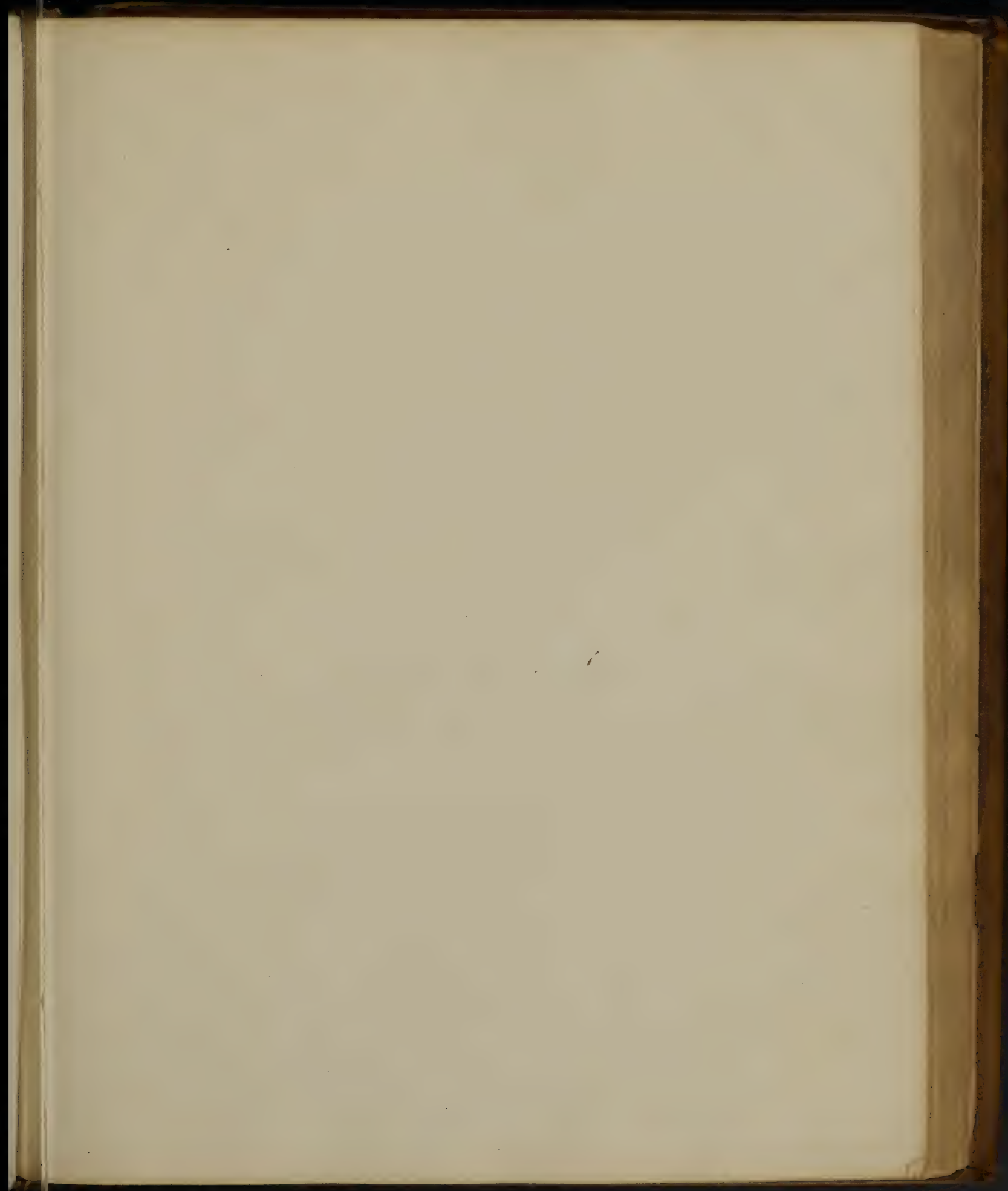


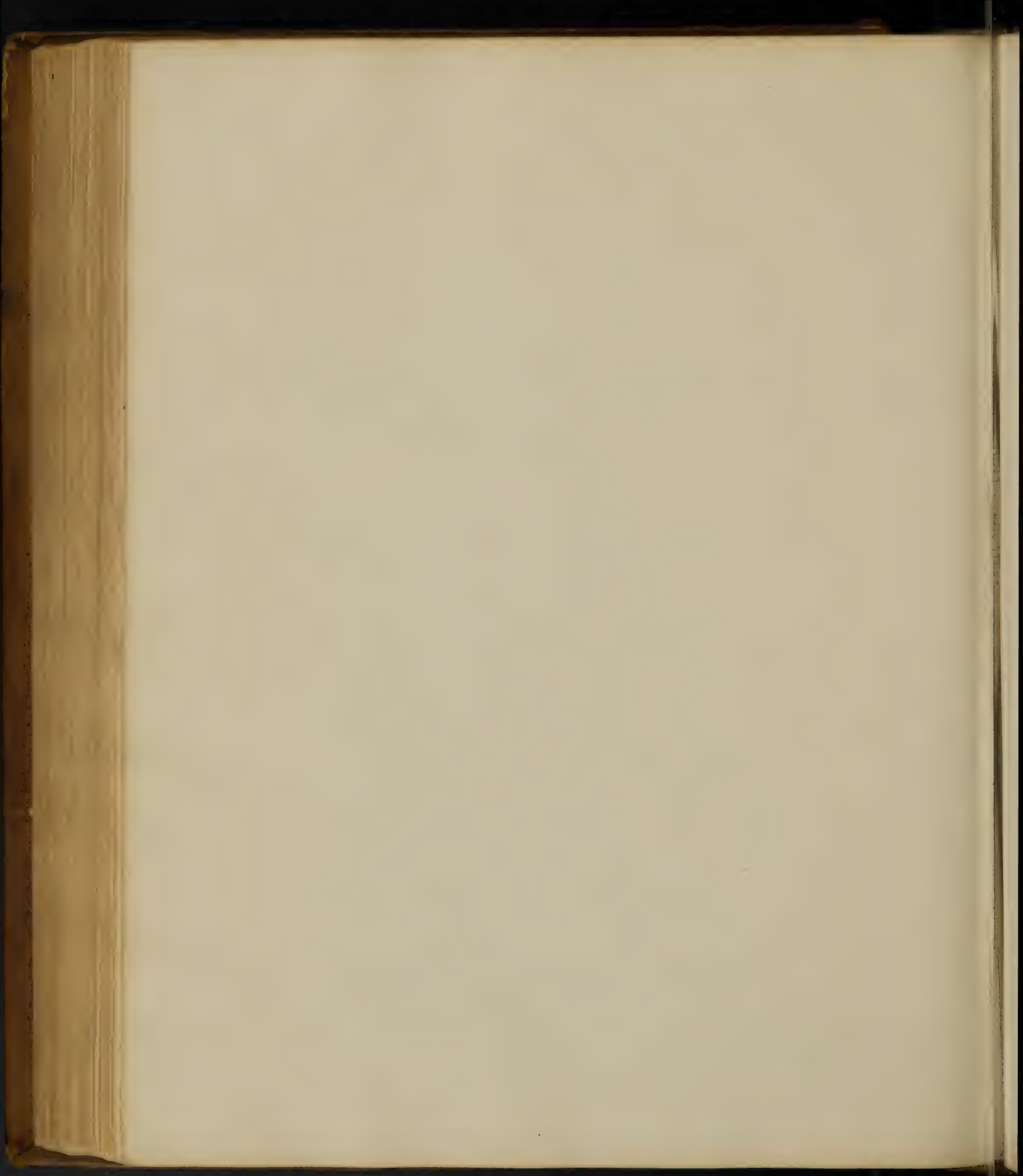


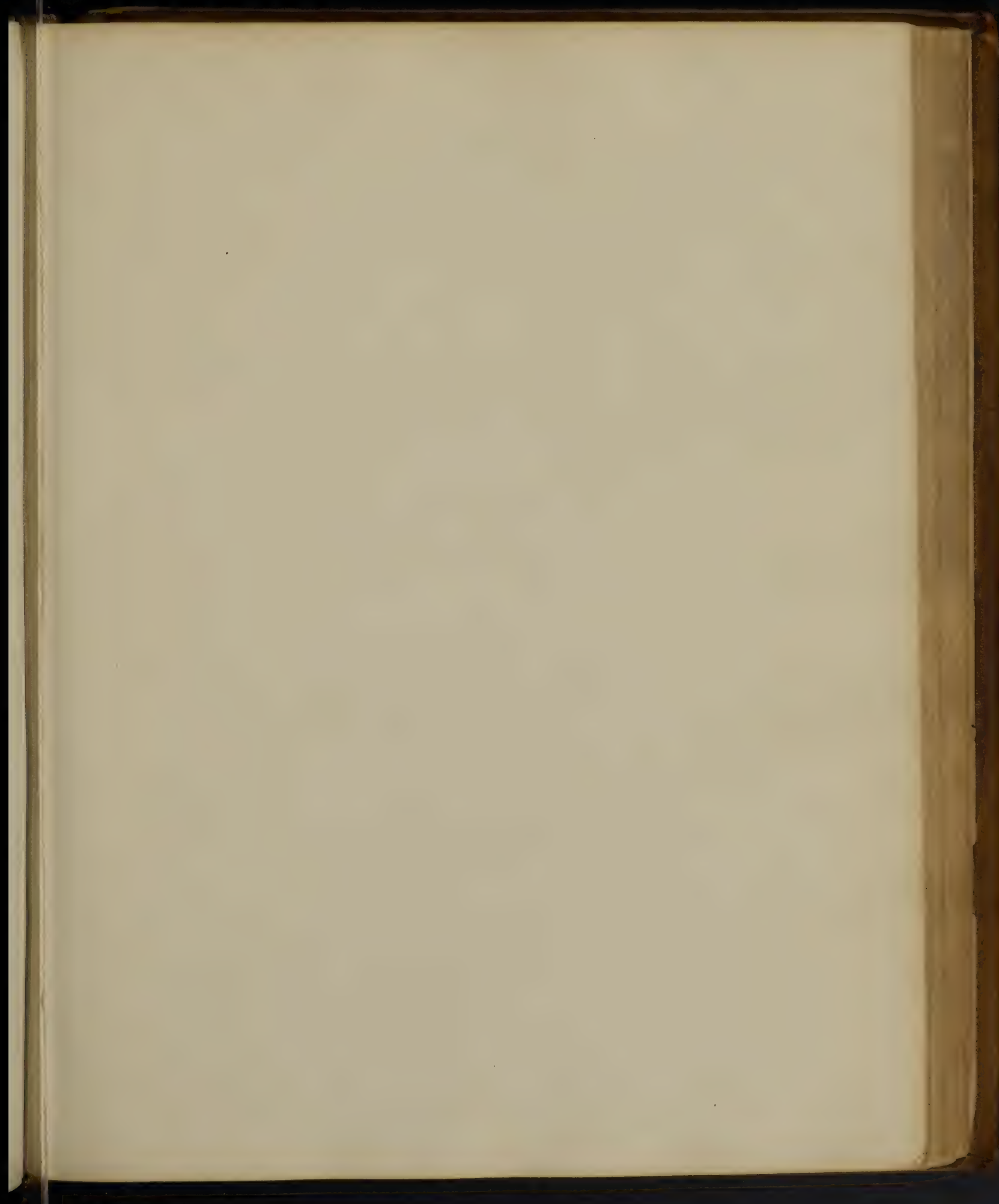


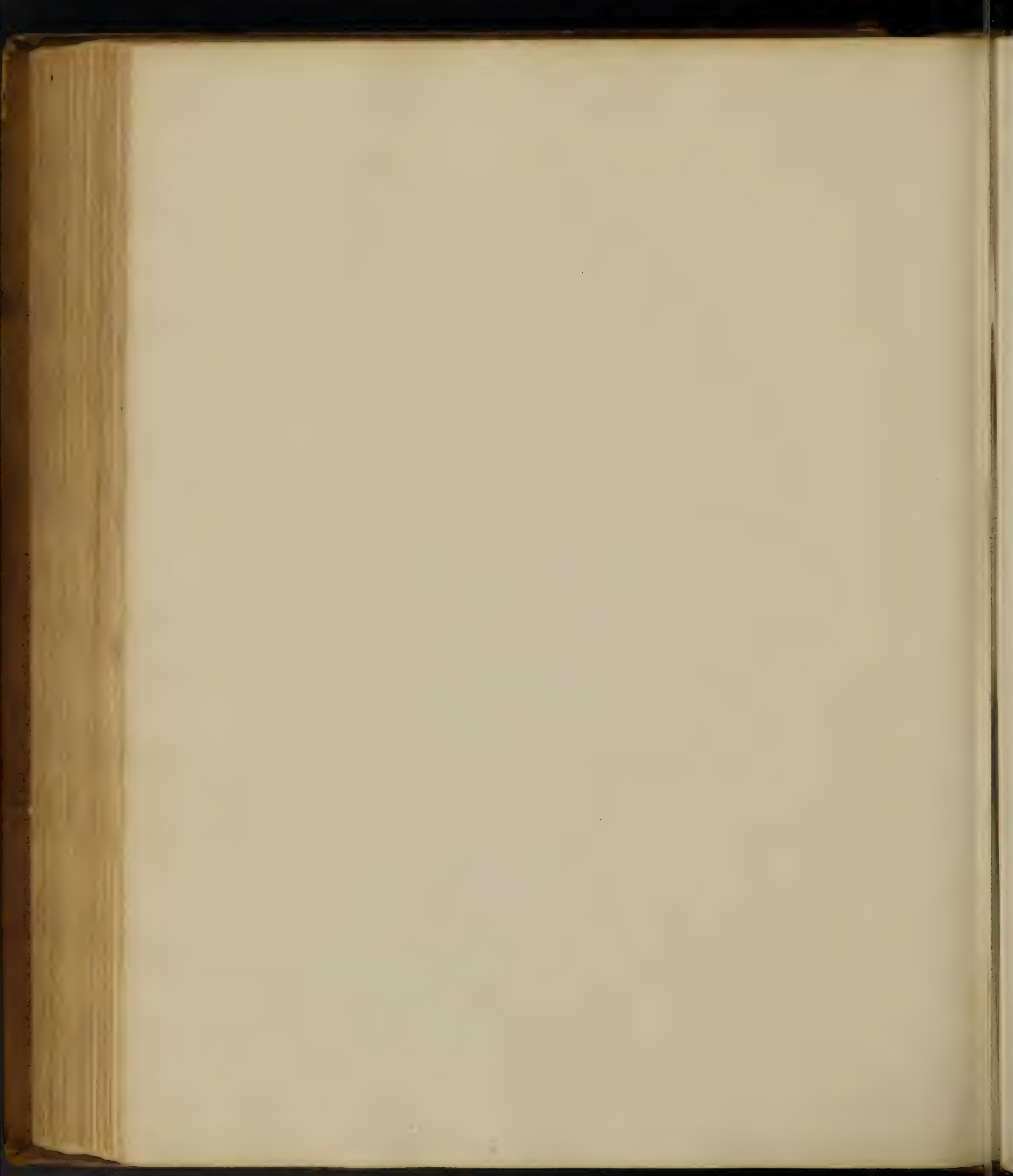


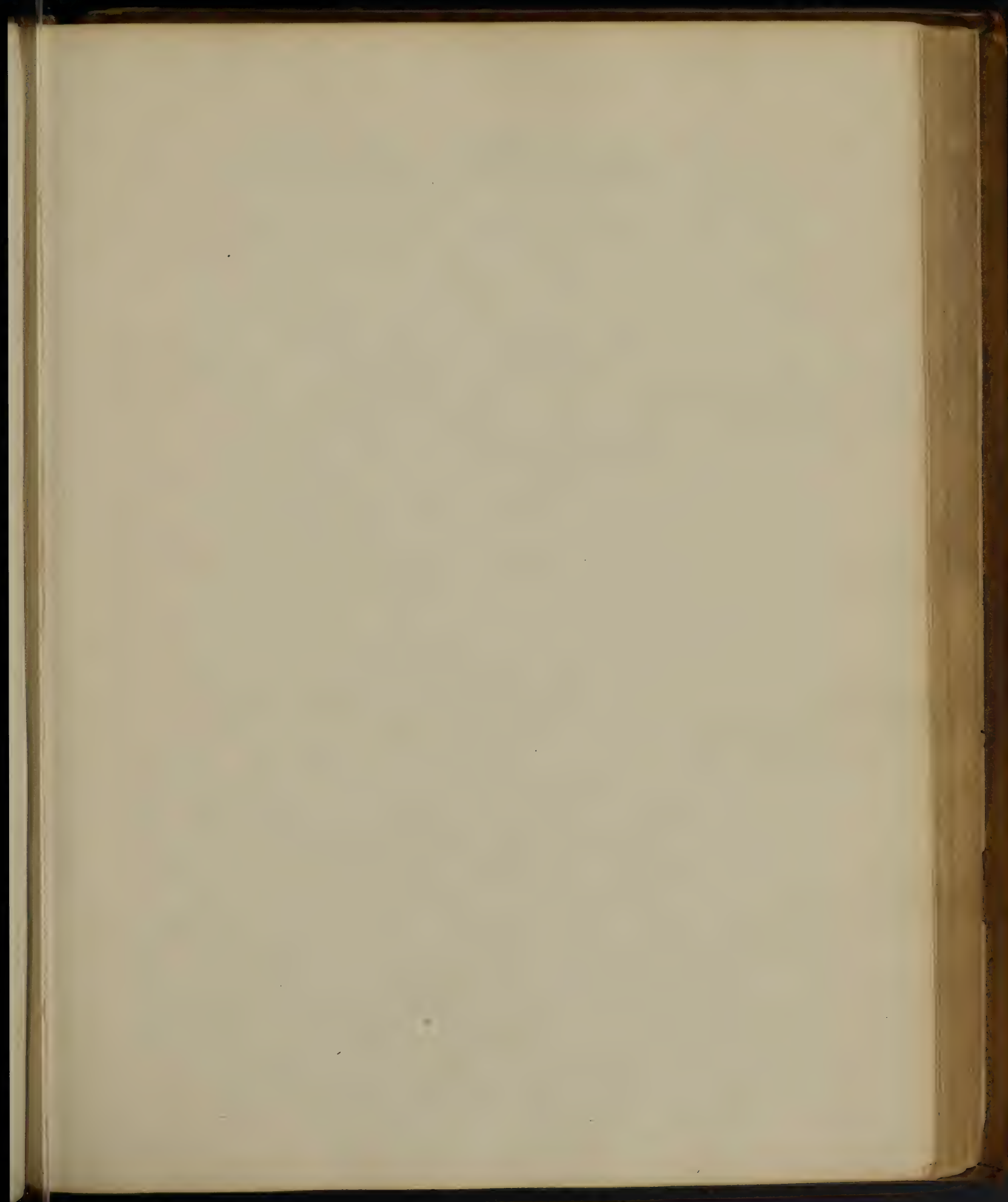


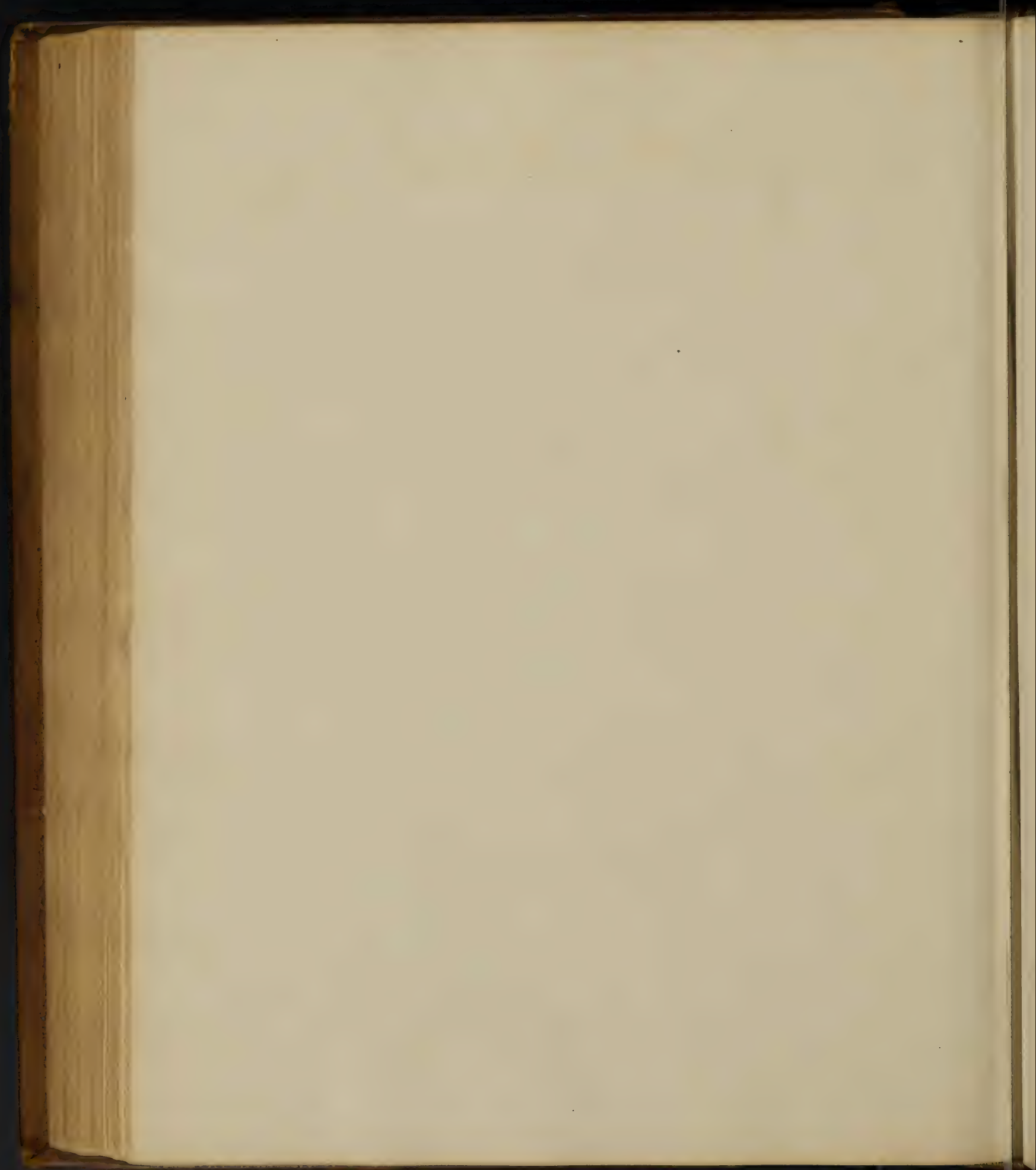












Public Wrongs.

By Judge Ware.
April 17th 1813.

What observations I shall make in this discourse, will be merely introductory to the general subject.

A Crime is said to be an act committed in violation of a Public Law, or something to do an act which the Law requires. Either of these are punishable. This may be either by C. D. or Statute Law. The C. D. is that which is used in Courts of Justice, & the evidence of it is found in the Reports of the proceedings of a Court of Justice, no matter how it originates, whether from Stat. or otherwise; no doubt but much of the C. D. is derived from ancient Statutes, which are now lost - but it is immaterial what it grew out of. The term *Misdemeanor* is often used. In common parlance it seems to intimate a smaller offence than the word Crime. But as used by writers in contradistinction from Crime, it is an attempt to commit a crime - a crime to which no punishment is affixed by particular name. - It is often a very high offence, as an attempt to commit burglary or murder. It is not the crime of burglary or murder, but it is an attempt to commit these, which is a misdemeanor, & a very high one in the latter case. The crime is not committed, but there is an attempt to do it. A misdemeanor then is an attempt to commit a crime, which has a name.

Sometimes a Stat. is made prohibiting a certain thing, but no penalty is affixed - now if the thing is done it is a misdemeanor, for which the person may be indicted. We have a Stat. in Conn. that none but a certain

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class of persons can marry. but no penalty is affixed for the violation of the Statute. Now if any others than those specified, do marry, they are guilty of a misdemeanor. This is always the case where the Law forbids an act to be done & affixes no penalty. now if there could be no punishment the Law would be nugatory.

Of the doctrine of Merges. In most crimes there is a private wrong & now it is said that in most cases there is no remedy for the private injury. and according to the Eng^t Law it is so in atrocious crimes, for it is said, the civil injury is merged in the Public Wrong. In some offences there is no such pretence, of merges, as in *§ 6th* & *§ 7th* of *Buttlers*. every offence short of Felony, where there is a remedy in the civil injury. The crimes for which there is no remedy at Law amount to Felony as theft, forgery &c. Felony is a crime which causes the forfeiture of a man's goods & chattels & is always punished with death, unless mitigated by Statute.

This doctrine I conceive cannot exist in the U.S. because our Laws as to punishment of crimes are entirely changed. they are not the Eng^t Laws. They say the civil injury is merged. Why? Suppose a man com mits a felony, & an individual suffers by it why sh^d he not recover for this injury? There is no reason why you should not, in the nature of the thing. but still you cannot in Eng^t. because the action would be entirely nugatory for the goods & chattels are all forfeited by the Public offence. but cannot you take the body? No the public want it to hang. this is the old Law in principle. It has been

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moderate by the allowance of benefit of Clergy in many cases. But when the rule was established the punishment was Death & a forfeiture of all the goods & chattels. So even the reason of the language the civil injury is merged. But even, for a case where there is no forfeiture, for the crime committed & the injured individual has a remedy, as if one pulls down your house in a riot.

In this country where the laws are all changed the criminals may be punished sometimes capitally, but still there is no forfeiture of goods & chattels. you may here then have your remedy for the private injury - as e.g. if a man robs on the highway - now in most of the States he is to be hanged - but there is no forfeiture of the goods & chattels - the person robbed has his remedy for civil injury he has sustained. This is neither breaking in upon, or departing from the Eng. C.D. It is following it up.

There is a division of Crimes into Mala in se & Mala prohibita. Crimes which are mala in se. are those which would be wrong if not prohibited by laws of society. Crimes which are mala prohibita are those which are prohibited by the laws of the land. This is the usual definition, but it is not strictly correct. There may be crimes mala in se which grow out of the state of society - as e.g. Burglary - this grows out of his breaking the house of another. So that all those crimes which a man's own conscience informs him are wrong, are mala in se. where this is not the case, but it is something prohibited by law it is mala prohibita. e.g. They have a

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Stat. in Eng? inquiring, that the dead shall be buried in 1600
or now no man's conscience would teach him that the
crime of burying in Simon, &c. was mala in se; and
many other examples might be given. Writers tell us
that there is a moral obligation on all men not to com-
mit crimes, mala in se, as to crimes mala prohibita
they say there is an implied contract, entered into by all
the members of society, that they will be bound by the laws.
This I think is not altogether correct - for if there was
only this implied assent, viz. to be bound by the laws, he might
make an express declaration that he would not be bound
by such a law. But this would not make any difference -
he is bound by the laws of society, let him make what
express declarations he pleases. He might have suited the
ideas of our sturdy Saxon Ancestors, to see that was this
implied assent, whose pride led them to believe that they
should not be bound by what they did not consent to.

The grand object of the law in punishing crimes is
not reformation - But to deter others from committing
them. If a reformation can be effected it will be so much
the better.

There are crimes which are Crimes at C.D. only, and
others, which are Crimes by Statute only - It is very com-
mon to make that a crime by Stat. which was so at
C.D. The object is to give an accumulative remedy, as
e.g. Forgery is a crime at C.D. & so also it is a crime by Stat.
Now when this is the case the Stat. providing a punishment
does not repeal the C.D. law; there are express words
in the Stat. to this effect - & the indictment may be either

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at C.D. or on the Statute. If both at C.D. the punishment will be the one provided by the C.D. - if on the Stat. the punishment will be such as is provided by the Statute. This is not all, - for sometimes the Stat. requires a different species of Evidence from that required by C.D. So likewise the Stat. may limit the time in which an indictment shall be preferred when there is no limitation at C.D. Now if there is an indictment on the Stat. and it cannot be supported under the Stat. as the limitation has expired still the indictment may be good at C.D. & he convicts on it. This principle may be applied to civil actions. If Stat. & gives double or treble damages now the C.D. never gives more than single damages - e.g. In Court if a man goes on another's land & wilfully commits a trespass by cutting down trees & carrying them off, not claiming them as his own, but doing it with dishonest view, a Statute has given treble damages. Now in an action on this Stat. there is one special request which is different from C.D. for it must be proved that the cutting was done wilfully - therefore if a man by mistake cuts a tree on another's land, he is not to suffer treble damages. Now you have said on the Statute that you cannot prove the trespass to have been wilful, - you cannot recover the treble damages, but are you to lose your action? No. you have declared for an injury at C.D. - you have put in sufficient in your declaration, you have proved a trespass, tho not a wilful one, you will therefore recover as is provided by C.D. - So in case of an indictment on the Statute, you may fail, & still

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the Defendant may be convicted at C.D. One thing further - If the Stat. gives a life punishment for a crime than the C.D. it is always a repeal of the C.D. for it is supposed the Stat. was made for the purpose of introducing a mild or punishment. and in such case the indictment must be based on the Statute. But when the punishment is not life than that by C.D. the Criminal may be indicted on either. We formerly had a Stat. in Conn. vs. Blasphemy, punishing it with Death! (see the Blue Laws. &c.) The punishment was so excessively severe, that I never knew an indictment brought upon the Stat. - they were always based at C.D. This is now left out of the Statute Book.

There are some crimes which are not punishable either by C.D. or Stat. - as e.g. the crime of inq. title, it is worse than Stealing Sheep, & yet for the latter a man might be hanged.

If those persons exempted from punishment, who
committing an act, which with a crime & punished in others.

In order to constitute a Crime there must be a wrong intent, except in a class of cases of cases I shall say by mention - and if it is a positive act, not an omission of duty, there must also be an evil act - an intention to commit the greatest crime, but so often it milder towards it is no crime, nor is it punishable. The act must follow & there must be a concurrence of the will with the act. or it is no crime. If the will intends a wrong, & it is committed, it is criminal & punishable. If the will intends to omit a duty imposed by Law, & it is omitted it is punishable. But when persons later

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under a disability which renders them unable to perform what was required of them by Law, it is no crime if they omit it. As if a Law should require a man to be at a certain place on such a day, & he had both his legs broken a few days previous, now it is no crime that he is not there on the day. In all cases of impossible necessity where a man is compelled to do an act & cannot resist, and in all cases of perfect accident where so far from concurring in the act it was vs his will, it is no crime. As if a man should innocently shoot at a Partridge, & accidentally kill a man in the bushes it is no crime, it is a mere accident. there is no concurrence of the will with the act.

Suppose there is a concurrence of yr will, yet there may be such a want of discernment & understanding, that the doing of the act will be excused & not be considered criminal, tho in other it would be a crime. Altho it is a crime in foro conscientiae to intend to do a wrong act, yet it cannot be punished by the Laws of Society, so on the other hand a vicious act, (i.e. one which is vicious otherwise, without any concurrence of the will, is not punishable. So in all cases where the person is a mere machine, & does a wrong without any intention, or if it is by accident, there can be no punishment. So where there is a total want of understanding, there can be no punishment.

The cases will not square with all these positions there are characters who are not liable this is the case with Infants. Now a person under the age of 21 cannot

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bind himself in a contract as a general rule. But between the ages of 14 & 21 the infant is as capable of committing crimes as any other person. after 14 infancy is no excuse. between 14 & 21 it is an age of uncertainty. if they have discretion they are to be punished the same as more than 14 years of age and this is to be enquired of. the maxim is "malitia supplet aetatem". malitia here means being capable of wrong motions. When an infant is under the age of 7 there can be no enquiry into his discretion - he is not punishable for any offence - this is a presumption of Law, & cannot be rebutted. You cannot show that a child under 7 has understanding sufficient to make him guilty of an offence. You see then that 7th principle that he must have understanding is not given up. Under 7 the Law says he has not understanding, between 7 & 14 an enquiry is to be made over 14 he is as liable for crimes as an adult.

In case of Idiots there is no understanding and they are not punishable. So in case of Lunatics, if they are properly madmen, they have no understanding and are not punishable tho they appear to possess cunning & discretion. But in case of partial derangement i.e. a derangement confined to a certain subject or subjects as to all other things they may be liable to punishment, but it is matter of enquiry. I know a case of this kind, a man was rational as to all subjects, except he said there was a duty imposed upon him to kill certain persons. As to this he was so much distracted. He killed his wife & was executed for it - and he was sure when they were

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condemning him to the fact that a Legion of Ignorance
usurped him. Now as to that thing he was certainly a mad
man & perhaps ought not to have punishment. In case of
clear Lunacy they are certainly not liable. Much else
to the discretion of the Juries. I have also heard that
they are to decide the Law on this point, viz whether the
person was capable of distinguishing right from wrong!

There are a class of persons, who are destitute of un-
derstanding, & yet are liable to punishment for their
crimes. I mean Drunkards. Intoxication is no ex-
cuse. Drunkards are as liable as sober men, & yet more
so, when intoxicated are as devoid of understanding
as any Lunatic. I do not know how they got along with
the Justinian Code for their man was

But with us a man in of policy governs, it would never
answer to suffer drunkenness to be plead as an excuse for
it were, many would get drunk for the very purpose of com-
mitting crimes. Now it is said that Lunacy occasioned
by drunkenness is a man's own act. This is true, & it is equally
true that he was deprived of his reason whereas, in
case of Lunacy this is not upon the act, & yet, and
therefore in the former case they say he sh^d. be always li-
able, & not in the latter. This is carrying it too far; for
suppose a man has been an habitual drunkard for
10 years, & has become an absolute Lunatic, & then kills
a man, he is not liable to punishment, & yet he has
this Lunacy upon himself. So if a man by getting
drunk, brings upon himself a fit of sickness, & at the
very time of his sickness he was compelled by Law to do

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Certain act, & on account of his Drunkenness he cannot do it. now he is excused & not punishable. But suppose he was lying & drunk at the time, it w^d be no excuse for him to plead drunkenness. It will never do to admit the idea that the man is not to be punished.

When the thing done is unintentional, as in the example above of killing a man by innocently shooting at a Partridge, the mind is entirely neutral. There is a distinction in the English Law, which we must observe. Suppose the man had a lawful right to go out & shoot at a Partridge, & used ordinary care & diligence & kills a man as a dove he is not liable it is here a mere accident. he was pursuing a lawful act. But suppose he was pursuing an unlawful act, as e.g. if he goes into a man's lot to shoot his Horse, & kills a man & either kills or maims him, he would be liable to punishment - if he broke his leg only he would be liable to damages (and I suppose he w^d be liable to damages if pursuing a lawful act). So you see he must be pursuing a lawful act - if not he is guilty tho' the will does not concur. Hence the principle is not kept up entire, for in the last case the mind is as inactive as in the other. A principle of policy governs, which is, that if a man will go about an unlawful act, he must bear the consequences. So it is a principle of policy which governs in the case of Drunkenness (before). But if the man was pursuing a lawful act & committed an injury policy does not require that he sh^d be answerable.

Suppose an injury is done thro' ignorance of fact, as e.g. a man's horse is broken open, & the owner is attempting

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attempting to kill the Burglar, kills one of his own family. he is excused - he intended to kill, but it was a person who had a right by Law to kill. & thus accident kills an other. But ignorance of the Law will not excuse a breach of it. It would be very mischievous in Society to allow a plea of ignorance of a positive Law. We are also to presume that after the publishing of a Law all the citizens are acquainted with it. It may be he supposed the punishment different from what it really is, & if he had known of the punishment, he would not have committed the crime - it is still no excuse. I know a case of that kind in Court: a man had served his time in our old Newgate, & went off to the Southward. Our Newgate was abolished for some time. & he returned into Court & committed a crime (Newgate then being revived, altho he did not know it) when tried up for sentence, he said "he had no idea that Newgate was revived. if he had known it, he never w^d have committed the crime". he knew too well what Newgate was ever to run the chances of getting in there again. his ignorance was no excuse - here again a principle of Policy governs which is - that after published all men must be presumed to be acquainted with the Laws of their country.

Of Compulsion. Civil Compulsion will (by the Laws of Society) excuse what w^d be a crime in foro conscientiae. Suppose inequity is established by Law & the citizens compelled to commit crimes - now before the bar of justice (for y^e commission of these crimes) he must be excused, for it was by civil compulsion, an obligation imposed by Law & so the judges must determine - if in conscience they cannot

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can any such a Law in effect, they must leave the Sinner
Persons compelled by a Superior to commit
crimes are not excused as a general rule. They are just
liable to the Laws of Society. - e.g. a master compels
his servant to commit a crime. the servant is not excu-
sed. There is but one connection in life where a compel-
sion by a Superior will excuse, and that is this, a wife
in certain cases is excused on the ground of coercion
marriage. But if she does it of her own will she is not ex-
cused. Hence a case where a husband commanded his
wife to go & throw down a man's fence, & she did it - she was
excused. If she does the act by the command or in compli-
ance with the husband she is excused, as it is presumed she
does it by compulsion. But if she goes of her own accord, she
is liable. There is one case where she commits a crime
in company with her husband, & yet she is liable. This
is where they keep a brothel together. She is the acting per-
son here, & the governor, & is liable. There are things which
are unlawful, & yet when done by contribution they are
excusable. Suppose e.g. this Country were invaded by an
Enemy & they compel waggons to transport provisions
for them. This compulsion excuses whether they are foreign
enemies, or a regular band of Rebels. So when an Enemy
gets possession of a part of a country & compel the inhabi-
tants around to furnish them with provisions, the in-
habitants are excused. No guilt at all is attached to the act.

Further you may see how an Enemy to pre-
vent a greater evil - as to save a City from conflagra-
tion, you may agree to a contribution, & it is no crime.

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the no freedom to his country would do it until abs. compulsion. But in civil society compulsion is by rights. It is not wrong, if the person agrees to do it after being compelled. But if he is made to act contrary to his wish, & is used as a mere machine, there is no concurrence of the will. & there is no crime. as if I take his by the heels & thrash him around the head of C. and kills. now B. is guilty of no crime for he is made use of as a mere instrument. The case of stealing to satisfy hunger. laborists say a man ought to steal sooner than starve. The Law however knows nothing of giving men a license to steal, & this is no policy. It would not be a crime in your conscience to steal to prevent starvation. indeed I think it is duty. but it is never do to allow it by Law.

Sept. 2nd April 19th 1813.

(Of Principals & Accessories.)

When crimes are committed certain persons are principals, & it often happens that certain persons are accessories. A Principal is the perpetrator of an offence. An Accessory is one who gives aid & countenance to the perpetration of an offence - or he may be an accessory after the fact, which is by giving some aid or relief to a person, who has perpetrated the offence. Now the Q^{ues} is, what is a principal? Whoever is present at the time the act is done, altho he does not commit the crime, yet if he countenances it, he is a principal, he is a perpetrator of the act. The only Q^{ues} then is "What is presence?" It is not necessary that the person be actually present at the spot in order to make him a principal, for it may

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commit a robbery and D. may keep watch at a distance. now D is not a principal as A. So as many persons as are watching (e.g.) are principals in the view of the law when are present. Hals P.C. 613. Moulton C.C. 350.

There are crimes which can be committed without the presence of any one - in such case they are principally the not present - as if a man lays poison - sets a trap - makes a pit fall - turns out a mad bull or lets loose a mad dog - if any injury ensues the person or persons are principally the not present. But a large crime is of such a nature as robbery. e.g. in order to constitute one a principal, he must be present in the sense I have mentioned.

An Accessory is of two kinds - one before the act or after the fact. An accessory before the fact is not, in the sense of the term, present at the commission of the crime. Who is he? He is any one who procures the crime to be done. He is not there at the time keeping watch &c. but he sets it on foot. So if he has authority and commands it, as a g. in manding a servant, or advises or encourages it, or lays motives before the party to do it - he is accessory before the fact. However he may not be an accessory to all which happens to be done in every case. The distinction is this. If A advises B to do an injury to C. and B does a greater injury than he is told, yet if it is the consequence of the injury he advised B to do, he is accessory. If B is advised to do an injury to C. and B does it & C dies in consequence of it. now A altho he never intended that B should have beaten him so much as to have occasioned

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his death, yet he is accessory to that homicide, because this is a consequence of the unlawful act which he advised. But suppose A. instead of advising C. had robbed him now A. is not accessory to the Robbery it is another crime distinct from the beating, & it is not a consequence of the thing advised: altho A. may by his advice put it in the head of C. to commit the Robbery he is not accessory to it. Hall (P.C. 515. 570. 617).

In Accessory after the fact, i.e. after the crime committed. No person is allowed by Law to assist or abet another who has committed a crime, I mean so to assist or abet him that he may escape from justice. An obvious thing is an accessory after the fact. As e.g. furnishing a villain (when pursued) with a horse, or concealing him till the pursuers go by. So if he is almost overtaken & has not eaten for some time & you furnish him with victuals. this is aiding & assisting him to escape. But if he is confined in jail & you furnish him with food, it is no offence. the idea is that you must not assist a man to escape from justice, so that the act of furnishing a criminal with food, knowing it will assist him in escaping from justice, makes one accessory after the fact. (Qu. by John Bruce Esq. Suppose a man were imprisoned for a crime, & another furnished him with complements to commit Suicide, wth he be accessory to the first crime? Suppose says Judge Reeves that he would be accessory after the fact to the crime for which the man was confined, & accessory to the fact of Suicide. the reason for the first is, that A. by enabling B.

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to kill himself, thus assisting B. to escape from the hands of justice. 2 Hawk 319. 1 Hale 620.

The crime must be complete to make a man accessory after the fact. - now A wounds B. - B dies of the wound. Some time afterwards we will take it for granted that it was murder in A. But before the death of B. C. is seized. A. gives him some relief. some comfort. Now is C. accessory to the murder? He has committed a misdemeanor, & had B. lived he (C.) w^d have been accessory to the wounding. But he cannot be an accessory to 2^d murder, for the crime was not complete when he assisted A. He may be punished for a high misdemeanor.

There is one character alone admitted to be around & assistance to one who has committed a crime, and this is a wife. No obligation in Society (one person inferior to a superior will. excuse from punishment if he is accessory after the fact except in the case of a wife. She may do every thing in her power to assist her husband in his escape, after her committing a crime, & still she will not be liable as accessory after the fact. On the other hand it is only conjugal fidelity. 2 Hawk 320. 1 Hale 621.

There are two offences in Society, the highest & the lowest, in which there can be no accessories. These are Treason & Treason. Whoever conducts so as to countenance Treason, tho' he is not present is himself a traitor; or who ever aids ~~and~~ a traitor in any way, is himself a traitor. This rule is established under the idea, that treason is a crime which strikes at the vital principles of society; therefore every one who has any thing to do with

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is a principal. The pass on the other hand is the same offence in the criminal code. it is not worth while to make a distinction between the committer & the aider & abettor, or "accessary". The Law will not stop for such little things. "Lex non curat minimas."

There are some unprompted crimes - and in these there can be no accessories before the fact - as in manslaughter there can be no accessory before the fact, for as you will hereafter see from the definition of manslaughter that it is a crime unprompted - if it is unprompted it is not manslaughter, but homicide. After all this, it may be enquired where is the necessity of drawing so nice a distinction between principals & accessories - & how is an accessory punished? At. C. C. the same measure of punishment is dealt out to both principals & accessories. - There are now Statutes in Eng^d & in most of the United States making a distinction between them. it has therefore become necessary to consider them as considered in the Statute. - But there are other reasons for drawing a distinction - there may be particular States where they have no Statutes - now in drawing the indictment, the person knows whether he is indicted as principal or accessory, & knowing this he is prepared to defend himself. The crime of aiding & abetting is distinct from that of committing the offence, tho the punishment may be the same. - But further, an accessory cannot be tried, till after the trial & conviction of the Principal - if the Principal is acquitted there can be no accessory - if he is convicted, the accessory may be tried -

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They are clearly distinct offences & so considered. You may e.g. indict a man for Forgery, & he may be acquitted, & then you may indict him & have him tried as a thief. This does not militate vs the principle that no man is to be jeopardized twice for the same crime. For here the person is not tried for the same but for a different crime. Suppose e.g. he is indicted for Burglary & constitutes which crime, he must break open the House in the night, & it turns out that it was day light when he broke in & stole your property. Now you may indict him for the Theft - for this is trying him for two distinct crimes. The maxim stands good that you can never try a man twice for the same crime. But it is now & will settle that a man acquitted as principal, may afterwards be tried as accessary. Foster 361. Hall 628.

Of Felony.

All the crimes which in Eng^d are denominated Felony, are called felony in this country. but what constitutes felony is not the same with us, as it is with them. e.g. Criminal V.D. which causes a forfeiture of a man's lands to the Lord & his goods & Chattels to the Crown is felony - is e.g. Forgery in Eng^d. Well is Forgery a felony here? Yes - but there is here no forfeiture as in Eng^d. Still we call it felony - we call the same offences felony what they do. but what constitutes the crime is not with us the same. & we say in our indictments he "feloniously" broke open the house &c. or he "feloniously" stole &c.

The severity of the ^{Eng^d} has abated in Eng^d. The first seven of our most felonious is not punishable with

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Death. They are entitled for the first offence,

The Benefit of Clergy.

The idea in those dark days was, that if a Clergyman committed an offence, his neck sh^d. be privileged from the halter. So any one who could read, was entitled to the benefit of Clergy - his being able to read made him ipso facto a Clergyman, - and as reading became common, every one became entitled to the benefit of Clergy, upon the presumption that everyone could read. So that every man was a Clergyman - & had only to ask for his benefit & it w^d. be granted. But women were never allowed the benefit of Clergy, upon the presumption that they c^d. not be Clergymen until the female reign of Queen Anne - they are now therefore Clergymen likewise. It is allowed for the purpose of abating the severity of the C. & S. This privilege was afterwards considered as extending mercy too far, & Statutes have prohibited & limited it in a variety of cases.

I shall now proceed to particular offences. I shall state to you the C. & S. & the alterations made in Eng^d. by Statutes. The C. & S. remains in this Country, where no alteration has been made by Stat. - The great object is to understand the C. & S. - The C. & S. may be altered in certain particulars in the States - but still there are universal principles remaining which cannot be altered - as e.g. we have altered the punishment of crimes in many cases - now the crime of Arson (which is the first I shall treat of) is the same here as in Eng^d. - what is Arson there, is Arson here - but we have altered the punishment of it. -

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Public Arson.

Arson.

This is an offence at C. D. "It is a wilful malicious burning the House of another" The word in the Register is "Domus" his domicile. The word "malicious" is here used in the same sense that malice is used throughout the Law. It is not necessary that the person sh^d. have a spirit of ill will - but it means any thing done thro a wicked motive. A man may murder another to get his money & yet not have the least spirit of ill will vs him, but his motive is wicked - This term is better explained by the Latin word "maliitia" which means wickedness in the abstract. What is done therefore thro a wicked motive is malicious, be the cause what it will. This is the case in Slander - the Declaration states "that A maliciously slandered him the p^p." Well how much malice was there? Why A. was a talking fellow - the story was a good one & he told it in sport - he did not do it perhaps in a spirit of ill will - but he had a wrong & wicked motive & therefore it is malicious. So if a man burns the House of another, it is malicious. if a man burns his own house & no further damage is done, it is not Arson. 1 Hawk 155.

Suppose a man burns a house which is not a domicile or dwelling house - no one lives in it - & it is at a sufficient distance so as not to endanger other houses - it is not Arson if nothing more happens. But if it was a house, in which persons lived a part of the year, tho they are not living in it at the time, it will be Arson. & of out houses, which are within the curtilage are so

Public Wrongs. J. E. Erson.

on fire. it is arson. these are considered as part of a mansion house. But a house built at a distance, & not in habit to be any one, as a store &c. if burnt, it is not arson. But by an Eng^l Stat. burning a house at a distance, or even a barn with corn in layer it is arson. and at C. D. burning a house of the last description, if it occasioned the burning of a dwelling house, was arson. 4 Co 20. 4 Bac 221. 1 Hawk 166.

Burning a man's own house was not Arson at C. D. Statutes have in some instances made it so. and in Penn^a our Stat. provides that the wilful burning of any house is arson. But at C. D. it always was so that if a man set fire to his own house, & it was the means of burning another, it w^d be arson, but then it is the burning of the other house which makes it arson. Now if a man sets fire to an old house of his own, which he wishes to have out of the way, and he has no animus malus, and there is no imprudence, no danger of burning his neighbors house, but a wind arises, & one of the lighted shingles is blown on his neighbors house, by which means it is burnt down - it is not arson. it is an accident - & there is no malice. But if the animus malus is evidenced by the act, it is arson, as if his neighbors house is within 5 rods of his, & he sets fire to his own house, & his neighbors is thereby burnt down, it is arson. the act is not only imprudent, but evinces an animus malus. To you see, there must be the malice in order to constitute the crime. Cro C. 377. 1 Hawk 166. J. E.

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Of Arson.

It will appear from the last authorities unco-
nscious of each other that there are two authorities, either
there (directly opposite to each other on a certain point,
viz. whether a man who had leased a house to another
could burn it, & not be guilty of Arson? One says it is
Arson... the other says it is not, because it is his own. An
answer to this is, that it is also the house of the lessor.
It is the lessors in reversion. it is burning the house
of another, & that is what was intended to be prevented.
The reason of punishing Arson, as it is punished, was
to prevent persons from turning others out of doors
by burning their houses. & thereby deprive them of a
dwelling. There is no difficulty in deciding this
if we refer to the principle - it is the lessors house
& ergo it is Arson. No regard is to be paid as to whose pro-
perty it is.

Arson, from Ardeo was the wilful & mali-
cious burning &c. Now what is burning? must the
house be burned down? If other things occur it is
Arson if there is the least possible burning - if you fire,
the animus malus it is Arson the the house is not burnt
(down). In a case where A. intended to burn the house of B.
But his mistake put fire to that of C. it was Arson
it was not Arson - as A. had no Malus animus w^t
C. But he did it thro' a wicked motive, & therefore it is
Arson. His being mistaken makes no difference. It
is the same as if A. lies in wait a dark night to kill
B. and C. comes along & A. kills him, thinking it was B. He
is guilty of the murder of C. The mistake will not avail him.

Public Wrongs of Arson.

The punishment of Arson at U.S. is Death & wherever this is not the punishment the alternative must be by Statute. The U.S. punishment remains in some of the States. In Conn. it remains with this distinction - wherever life is endangered by the Arson, the punishment is Death - if there is no ~~life~~ endangerment the punishment is by sending them to a New State. If one takes the opportunity of burning a dwelling house when he knows the family are all absent, it is arson - but the punishment is not death - but to serve a few years in Newgate.

11th Br. April 22^d 1812.

Of Burglary.

Burglary "is the breaking & entering a mans house (dwelling) in the night season with intent to commit a felony." It must be with an intent to commit a felony i.e. to commit one of the crimes which were punishable at the time with death & a forfeiture of goods & chattels, whether that is the punishment with or without Statute as we call felony, to the punishment what it was. Both different branches of the definition have been a variety of ^{expressions} definitions settling the law as to their meaning. I shall not pursue the words of the definition. The first part, which I shall consider is, that it must be in the "night season". What is meant by "night season"? If the act is committed at a time when a mans house may be distinguished by the light of the Moon, it is not Burglary, although by the light of the Moon you are not to understand by that that the fire must be up. The

Public Wrongs. Burglary.

There may have been some, or not yet have arisen, yet afford sufficient light to distinguish a human face. The light of the sun is certainly distinguished from light of the moon. So if it should be moonlight by moonlight, still if there are the other requisites it is Burglary. No house can be found where, on the day may be so cloudy that you cannot discern a face. But altho' it is not Burglary, still it may be another offence which is punishable. 7 Co 66. Moor 660. 1 Hawk P.C. 166. Cro. 583. 9 Co 66.

The place must be a "Mansion House" &c. add to the definition (were I to make one) after the words mansion house, "or church" for it is admitted that Burglary may be committed in breaking open a Church. But Lord Coke in giving the definition did not add this for he said a Church was a mansion house. and I enquire, whose? He says "Gods". He says it is not a mansion house, but still Burglary may be committed upon a Church if it is broken open in the night with an intent to commit a felony. It must be a mansion house, now a house not inhabited as it is not considered a mansion house, & it is not burglary to break it open. But if it be inhabited a part of the year, e.g. a Summer residence it is a "mansion house" within the meaning of the definition. No building is considered a mansion house unless it is within the Curtilage. It is difficult to lay down any precise rule as to what buildings are within the Curtilage. We generally mean those buildings so near the

Public Wares.

By Boundary.

mainly there, the breaking of which would be a terrible
 crime. It is not burglary at all. It is not open theft.
 It would have in many places made it burglary. This
 might mean by adjoining the house an enclosure or
 part of it, sufficient to it. It is not burglary at all
 to break open a shop containing goods. But in fact
 we have a Statute relating to this in this respect, which
 makes it burglary to break open a shop containing
 goods, wares, & merchandise. In all other respects, however,
 the same offence which is burglary in fact, would be
 burglary in fact. That Statute has been intended to
 great length - it has been determined that under
 this words "shop containing goods" it included
 the breaking open of a shop where a shop. It has also
 been determined in some instances that the breaking
 open of a school house & stealing the books was bur-
 glary. And it is well known that under this Statute
 it is burglary to break open a cabin of a vessel with
 intent to commit a felony. This Statute to be carry-
 ing the principle of construction too far, & to give
 the intention of the Legislature - who have conferred
 under the words "shop containing goods" to mean to
 include only stores containing goods, in the accep-
 tation that we use the word store. Dec. by the House.
 Suppose a person lodges in a store, & it is not burglary to break
 it open, even at night. There has been some question this
 night the judges, but it is not persons were accustomed to lodge
 in the store, I think it will be burglary & not if not.
 1 Nov. 1824. 6 C. 40. Keeling on Crim. Law 27. 52. 10 p. 17.

Public Offices.

H. H. H. H.

There must be a "Breaking": what is meant by this? It must be not merely a legal breaking with arms; for if a man goes into another's lot to cut down trees, this is said to be a breaking into his close with arms. So if A enters B's house in the night, unarmed, with intent to commit a felony & enters & it will, if the door or window is open, this is a breaking, it is an entry with arms; but it is not burglary, within the meaning of the definition. To constitute Burglary, the house must have been shut & then broken open. It need not be fastened with bolt or any thing of the kind - lifting a latch is sufficient - it is a "breaking". There is but one instance where a person can commit burglary, if the place where he enters the house is left open - & this is entering a house thro the Chimney - it is burglary as much as if he had broken a door or window. For this reason it is necessary to make this exception, for a chimney cannot easily be fastened or shut. Burglary is frequently committed in this way. "Keeling on C. 2. 52. 63. Hutton 20. Cro. E. 5. 225.

Altho a man should get into a house without breaking or lifting a latch &c. yet if he procures an entrance by force, it is the same as if he had broken open the House - it is burglary. This is the effect of force in all cases. it blots out the benefit he might otherwise receive. E.g. Suppose A goes to B's house in the night & knocks. B asks, "who is there?" A answers, "I am B." B opens the door & A rushes in - this is a Breaking. So

Public Houses.

of Hertford.

He is one without an actual procuration warrant & on other, which is a mere cover for his iniquity, & delivers it to a constable to arrest the person, & he & his comrades accompany the constable. Now if it is a criminal charge, the officer serving is obliged to do his duty, & may break open the door if refused admittance, but supposing the door is opened, & these fellows rush in, bind the constable, & do what they please, this is an "entering" it was a mere ruse to obtain admittance.

There must be an "entering". No matter how partial the entering is, as a legal part of the entry, it is sufficient. It is an "entering": one foot over the door sill is sufficient. But there is no necessity that there should be any entering of the person of the person, it is enough with an entrance, as e.g. a man hoists a window, & put in a pole, & look out some clothes, this was entering. Indeed this "entering" is carried to great nicety. I need not mention all the cases, as they are multiparious. I will mention one case which will sufficiently explain it. Even the turning of a key & unlocking a door has been held sufficient. The case was this - a man got a false key & unlocked the door. The family were alarmed, and he escaped. The Ct. determined it was an entering, for the key, which was an instrument *ut supra*, had gone through the door - now from this case, one would suppose that any instance you put in, it is an "entering". In the last case, if the lock had been in the door, or outside so that the key would not have to be put through the

door, according to the principle it would not be an entering. But this is not the case.

There was a case where a man hid a gun in a room, & put a pistol in, - he did not put his hand in, & a pole, as in the case above. But the man of the House coming in the room, he seized the pistol at him, & demanded the money of the man, & compelled him to deliver it to him - it would undoubtedly be under another kind, i.e. Robbery, but the question was whether it was Burglary? The Ct. returned that it was, & that it was an entering. If the pistol in this case had not been put thro' the window, but had been kept outside it would not have been burglary. See Crim. Law, 111.

A person concerned in the transaction as Burglarious, as well as the one who breaks open the house. But if he has confederates keeping watch at the door. They are considered as being present. So if the confederacy is with some one in the house, as if a servant, & opens the door, it is burglary, in both the servant & the person entering. It is the same as if he were without. See 304.

It must be "with an intent to commit a felony." The felony need not be committed, but there must be an intent to commit it. This intent will be inferred in most cases, & the courts proscribe will lay upon the person to prove there was no such intent. For if a person goes into a house in the night, we may naturally suppose his intention was to commit

a felony. It is rather difficult to ascertain from circumstance, when there is, & when there is not this intent. The presumption however is, in the person. But there may be cases; where the person entering had no intention of committing a felony, as if he breaks in to procure a night's lodging. The thing is intended to be done, thus as a felony if it were committed. I know one case where a man broke into a house & was held not to be guilty of Burglary on the ground that there was no intention to commit a felony - the owner frequently found that his house had been broken open in the night, but never could find that any thing had been stolen. He afterwards discovered that it had been done by his neighbour's negro man Quazar who came in to see his black sister Violet. The presumption (when it is shown that a person breaks & enters &c.) that it was done to commit a felony is only a presumption of fact & may be rebutted, *ut supra*. *How 53. Shaw 481. 12 Hawk 104.*

One thing farther. Suppose one is an inmate or servant in the house, or a traveller putting up at an Inn, & then steals & breaks out, - is it Burglary? Now this depends upon the *Qu.* whether he intended to break out & go off. If so, it is Burglary. In case of a traveller stealing & breaking out, it is Burglary. If the evidence is strong & strong of the inmate or servant it is the same in the law. But if a man may live in the house & afterwards break out & go it will not be Burglary. If the design at the time of the stealing is not to break out of the house & go off, it is not Burglary. If this is designed

Public Wrongs.

of Burglary.

at the time, it is burglary. The punishment of the offence at S. S. is death, without benefit of clergy. Now if any one of the States have altered the punishment by Statute, the punishment for the 1st offence is by 26. in 4 years. for the 2^d offence by 4. if he persists, & 4 more for life. The next offence is crime of a higher class than is

Perjury.

Perjury is "false swearing wilfully, in a point material in the case, by one under oath, & administered by a person authorized to administer an oath." All these requisites must concur to make it perjury. - but altho they do not, & it is not perjury, still it may be false swearing. I have given the definition in the order of finding it, tho I shall not explain it in that order.

1st It must be false swearing "wilfully" - inasmuch as it can be made to appear to be a case of mistake or surmise, it is not perjury. One may swear to see S. S. at such a place on a certain day, & tho it can be proved that S. S. was not there, yet it may not be perjury. the witness might be mistaken, or in a case I know of 2 women brothers very much resembling each other & there must be an intent to do wrong to constitute perjury. 5 M. & 350. 10 S. 170. 1 Falt 313. 1 Hawk 314.

2^d It must be a wilful "false" swearing. False is not meant that it must be false in fact, & it is not necessary that it be really false. It means something more than merely that the fact is not true.

Public Utterances of Perjury.

A man may swear not falsely, and yet the fact be true. On the other hand, he may swear falsely yet the fact may be true. If he swears to such a fact, & he knows nothing about it, & thus swears in ignorance, this is perjury. The word "false" is applied to the intention. A man swearing to what he knows nothing about, swears corruptly. & it is "false" swearing. Palm 292.3. 408292. 1 Tim. 322.

It was formerly held that this swearing must be positive, & that if one swears according to the best of his knowledge "or" he can't not be guilty of Perjury. This opinion is now obsolete. A man might always swear so (if that was y. rule) for the purpose of raising credit, & it is as much Perjury to swear in this cautious manner, as to swear positively to a fact which is untrue, or to one which he knows nothing about.

It must be on a "point material". It appears to me almost impossible to find a person so foolish as to swear to an immaterial point concerning which he was wholly ignorant, or else knew to be absolutely false, without having some object in so doing. But suppose such a case as if the witness swears I rode a white horse, which is wholly immaterial, but in fact I rode a Black one. Now it is said this is not perjury - nor is it, if the witness had no object in view in falsely swearing to this immaterial point. But if he had an object in so doing, as to gain credit in the minds of the Ct. or jury, it is corrupt swearing, it is perjury, altho the fact sworn to is wholly immaterial. As when a witness came into Ct. & commenced by saying "that he

Public Wrongs. Perjury.

got up in the morning & told his wife something about getting breakfast, & then went out into the fields & told his old grey mare 100 and tells all these simple things for the purpose of gaining credit, there not being a word of truth in them. He is perjury, & always was! if he had no such corrupt object in view it is not perjury. 100. C. 500. 1 Salt 514. Earth 422. Palm 382. 1 Hawk 324.

What is necessary to make the point "material"? Must it be so material that if believed it would of itself turn the case? No. If it conduces to prove the case, it is "material" - it is perjury. 5. May 2258. 884.

IVth This false swearing must also be "relative to some proceeding in a Court of Justice." The oath need not be taken in a Court, as one may commit perjury in any thing which respects proceedings in a Court, as e.g. in a Deposition taken out of Court. So also if there is a commission issued for the taking of Depositions, a false oath amounts to Perjury. There was formerly an opinion that swearing falsely &c. before arbitrators was not Perjury, on the ground that it was not before a Court. But this is all exploded. It is a donee the Court & the oath is relative to a proceeding in a Court. 1 Hawk 324.

It was formerly supposed that the Court must be a Court of record, & thus it was not perjury to swear falsely in a C. of Chy. as it was not a C. of record. This is exploded. False affidavits if relative to a proceeding in a Court makes the person guilty of perjury. But if it is a more private affidavit & thus

not relate to any thing in Court, it is not perjury. If
 if a man swears in an affidavit with an intent to pub-
 lish it in a Court paper, it is published, but it does not
 follow it is not perjury. So if a man who makes a
 contract for a thing to be done, and then he does not
 perform. Such & such things he does not; it is not per-
 jury. If a man does not follow his oath in office
 as of a grand juror, he is not to enforce in all these
 cases it is not perjury, tho it may be mis-
 it does not relate to a proceeding in a Court of Justice.
 This distinction should be kept clearly in mind.
 See 8:108. 107. 185. 609.

Vth The oath must be administered by a
 person authorized to administer it. Suppose an arbi-
 trator should administer the oath in a case depending
 before him, it is not perjury to swear falsely in such
 case. It must be administered by a magistrate or
 other person having authority to do it. But an arbi-
 trator has no such authority. And it is an offence
 for any person to administer an oath, who has no
 authority - it is extrajudicial. It is a law, whether
 if a Court has no jurisdiction, or having a juris-
 diction to a certain extent, or they exceed it. Admin-
 ister an oath, & the witness swears falsely, is it
 perjury? The modern cases say it is perjury. It is a
 case where the C. has jurisdiction, supposing
 they have it, when in fact they have not. The Q. C.
 whether they have jurisdiction is to be decided by a Higher Court.
 If it were not considered perjury, the evil it does is great. 10th 186.

Public Wrongs.

Of Perjury.

If a Party himself swears false in what he is allowed to swear, as in Oath, or by Stat. in many cases e.g. in an Affidavit, it is perjury, as much as it is in a Will or a Contract.

Of Punishment. This offence was once punished with death at C.D. but this has long since ceased - this was certainly a punishment beyond the deservite of the perjurer in the view of Society. They punished in those early days according to the atrocity of the crime in the sight of God in fore conscience. But this is not now the rule in fixing the punishment of offences - it is to punish an offence ~~according~~ commensurate with the evil resulting to Society from the commission. The old punishment for perjury is not now anywhere in use. At first it was towards it was punished with banishment, & in some of the barbarous ages with cutting out the tongue. But these are all gone away. It is now punished with fine Imprisonment & Pillory, at the discretion of the Court, & followed with this consequence, that the Convict never after shall be admitted to testify in a Court of Justice - or in other words the consequence is legal infamy. It is the Crime false. But you will remember he is excluded from testifying out to prove the conviction, which is done by the record alone. They have Statutes in Eng^d determining the time of imprisonment how long they shall stand on the Pillory & so that the discretion of the Ct seems to be taken away as to the latter. Our Court Stat. is in affirmance of the C.D. which punished the Convict as above in Eng^d & also enacts that he shall be liable to damages. Now under this last clause

Public Wrongs.

1847. July.

does not. A case has arisen whether the person injured
is obliged to take up with the sum [fine] fixed by law
or whether he may remit this & sue at law for the
damages he has sustained? It is said the fine set
discharges the damages - now I conceive this to be no law
at all - the matter of damages has arisen upon it.
My opinion is this - If the party injured will take this
sum as the amount of his damages it will be his own
business. But I cannot conceive he can be compelled
to receive this sum fixed by law, & not even by the
legislature itself. Suppose the party is now injured
\$1000, & the fine is \$100 only. now I conceive he cannot
be compelled to take up with this - but may remit
it. It takes it to be a sound & acknowledged principle
that a party may waive a provision of law
in favor of his private interest - but if it were other-
wise it would be compulsory. The public punish-
ment, & the individual's redress, they have mingled
together - the public may waive - but may not
an individual? Suppose a Stat. gives a fine or
penalty to the Public & threatens damages to the
person - now the Public may waive & who may not
the individual? There is no reason to the contrary -
I conceive that whenever the Law mingles a pub-
lic punishment, & private damages, as the public
may waive the punishment so the party may
waive the provision of Law on his favor if he
will. ~ ~ ~

Public Offences.

Subornation of Perjury. Dict! 4th April 23rd 1813.

As to subornation of perjury, nothing more need be said, but that it is "where one person induces or procures another to swear falsely." The punishment is the same as in perjury. The indictment is different it is for a different offence. It is not indicted for perjury but for subornation of perjury.

Forgery.

Forgery at C.D. is "making or attaining an instrument or any authentic matter of a public nature, or any deed or will with an intent to prevent justice being done."

It is "Any matter of record" this refers to judgments of Courts & legislative acts - nothing but these are records. There are certain things records & which are properly called records - they are not so; but are of a public nature as Parish Registers. Certificates of marriages & births &c. Records of debts are not records within the meaning of the definition.

The first subject of forgery then is judgments of Courts & legislative acts which are records - the next is matters of a "public nature" as certificates of marriages &c. - the next is deeds, i.e. any private instrument in writing - the next is wills, frequently having no seal &c. &c. of any other instruments but these are attested, it is not forgery at C.D.

You will also remember it must be done with a fraudulent intent (i.e. with an intent to prevent justice being done).

Public Wrongs. Of Forgery.

The Statutes in your several States have not hitherto made more than a forgery which were not so at C.D., but this you will be able to ascertain by reference to your Statute Books. It was not forgery at C.D. to utter a note of hand, or indeed any instrument at all less solemnly than they even make at C.D. It was a misdemeanor, for which the person might be punished, but it was not forgery. 17 How 335. 10 Mod 296. 335. 1 Mod 66. It will explain by examples.

A. conveys to B. by Deed which is a sealed instrument. He (A.) then sells to C. and validates the deed to C. before that to B. Now this is forgery, because of the validating, tho' there has been no alteration made. It was made with a fraudulent intent to defraud B. of his title. Moor 655. 759. 17 How 336.

Again, a man employs another to write his will, & directs him how to write it, & the scrivener inserts a legacy never intended by the testator to be granted; when it is read the testator may read over the will & discover this. But if he does not discover it & signs it; or if it is read to him, & the reader purposely omits the clause containing the legacy it is a forgery. So where a man's name is found on a piece of paper, & the person writes any instrument, or on it obliging the man to the payment of money, or any duty, now if a seal is affixed it is forgery at C.D. it would not be forgery at C.D. if no seal is affixed. 3 Mod 66. 3 Mod 192 or 182.

In Eng^d. by Statute the crime of Forgery is extended to a variety of cases, & so in the different States.

Public Wrongs. Forgery.

U.S. By a Stat. in Conn. it has been extended to all writings - after enumerating several kinds of instruments, the Stat. concludes with the sweeping clause, "any other writing the alteration of which is to prevent justice & equity." How far it has been extended in the other States I know not. My object is to give you the C.D. or then you can rely on the variations made by Statutes in your several States.

Under the sweeping clause in our Stat. it has been determined, a man can be convicted of forgery in altering a writing not specified - even ^{if} it was to prevent justice & equity. The object in making the alteration must be fraudulent; for what ever alteration may be made, in whatever effect it may have, if it is not done to prevent justice and equity, it is not Forgery. A case in the Books where a man drew a bond for £500 instead of 500 marks. The obligor drew the bond & the mistake was his own. The obligee took the bond home & finding the mistake struck out the word "Pounds" and inserted "Marks", and the honest fellow was indicted for Forgery. But the Court determined it was not Forgery, for it was not altered with a view to prevent justice & equity. He however never could recover upon it; for it is a rule that if a bond &c. is altered in a material part, by the obligee, tho' he himself, he never can recover upon it - still it is not forgery, it is no offence.

There has been a great Qu. whether this is Forgery. inserting a legacy in a will, contrary to the

Public Wrongs.

Forgery.

directions of the testator had always been known to be
Forgery, but the case was this. The testator was directed
to make a Legacy, & he negligently omitted it. He read
the will to the testator, as if it was there, it was
an offence, a civil injury, but was it forgery? On
the one hand it was said there was no making or
altering, which was necessary to constitute forgery
& therefore there was no forgery. and on the other hand
it was contended to be a forgery of the whole will -
the property was all disposed of & the intention of the
testator defeated. It was held to be forgery. *Hawth.*
P.S. 337. There are different opinions upon this, & it is
not well settled. One thing is clear, if it is essential
to forgery that there be a positive act, it is not
forgery. On the other hand, if the omission was the
instrument a totally different effect from that in-
tended, why is it not forgery? Besides it is mani-
fest that this Legacy which was given to A. is now
distributed among the other legatees, contrary to the
intention of the testator. The instrument directed to be
made is one thing, & that made is another. Then why is
it not forgery? I think there is much reason in the
affirmation of this. Not because of the omission
in itself considered but because that omission gave
the will a different effect from that intended by the testator.

Now matter of fact if that be shown to be
the case, cannot be forgery - as if it were shown that
a man named A. placed a paper in B's hand, & B. wrote a letter
either over it, it is not forgery. It was not intended

Public Utterances. Forgery.

to prevent Justice. But if you had written a Bond or Note over it, as notes are by Stat^s, placed on the same footing, I should attempt to collect, & it is to be forgery. But if this was done for mere sport or large & plausible the obligor and its circumstances, and no intention of preventing Justice as appears, it is not forgery. So to ascertain whether a forgery or not, the circumstances must be inquired into.

The Punishment by C.D. was fine or imprisonment and Pillory. This is taken away in Eng^t by Stat^s, & the punishment substituted is Death, without benefit of Clergy. - And the C.D. punishment is taken away I believe in most of the States. In Conn. it is still retained. But in a great & commercial Country, like G. Britain it was found necessary to lay a more severe law upon this crime, than that of the C.D. When not only C.D. punishment but capital punishment is taken away, the indictment might still have been at C.D. for the punishment in your several States, see your Statute Books. -

Of Larceny.

There are two offences viz. Burglary & Larceny called Compound Larceny. These are included in the benefit of Clergy in the Eng^t Law, & 13C. 239. There is also what is called Simple Larceny, or what is common, or larceny is called Theft. It is plain that an accomplice in any direct operations. It is divided into Robbery & Petit Larceny. The only ground for the distinction is on account of the punishment. The

Public Wrongs.

Of Larceny.

Detachment of Petit Larceny at C. S. was not death; But
in case of Grand Larceny it was death with benefit of clergy.

Petit Larceny was where the value of the prop-
erty stolen did not exceed 12^d. but at that time the value
of 12^d. was a great sum of money. and for this reason, some
think have a man hanged for theft the Jurors in the U. S.
would probably find the value of the property stolen to be
12^d. now, ever so much. But the distinction between
Grand & Petit Larceny is now done away. Statutes in
all of the States, & no difference made between them, the
law, remains in the same way. I will state the Law
of these under the head of

Theft. This includes both Grand & Petit Lar-
ceny. Theft is the felonious taking & carrying away
by any person, the personal goods of another, not
from his person nor from his House. This definition
needs some explanation and some addition. If property
is taken from the Person, it is Robbery, if from
the House in the night season, it is Burglary, and
not theft. But there may be a stealing from the House
on the day time. I would therefore add in this definition
let it read thus. "not from the Person or the House in
the night season."

It must be "Felonious" - it must be an im-
purposed - with intent to steal. Whenever there is that
intention, there is by the English Law a Felony & it is
a Theft. If there is not this intention, it is not theft.
As if a servant takes his masters horse out of the
stable at night & rides him to a public &c. this is

Public Wrongs.

of Theft.

not theft. it was not done against the owner's will. it is not taken from him, or his horse, or his property, at a certain distance, or then left his horse, or his property, or his horse, it is not theft. in turning the horse loose, or tying him, it is not theft. the presumption of its being done against the owner's will. But yet if an owner pursuing his horse, and the horse runs off, you fear it being taken, it would be theft. this presumption, that he took the horse against the owner's will. Suppose one goes into his neighbor's field, & without his consent takes off his plough, & goes to using it, he has it. this is not theft - it is a trespass. there appears no intent to steal - no intention of fraud.

Suppose, probably, e.g. a horse is bailed to a person - and the bailor at the time he receives the horse, has no intention of going off with him - but afterwards it is not theft in such case - but if there was any fraud in procuring the bailment - as if the bailor intended to go off with the horse, it is theft, if he does go off with him. The fraud does not end the bailment, he was to receive him from the bailment. the bailment is extinguished. e.g. suppose a man hires a horse at Whitefield to ride to Hartford, & he turns the other way & goes to New York. is it then theft? say the owner, when the owner comes up, there is no doubt but it is theft. this conduct, however, does not show that the bailment was procured against the owner's will. But if it appears to be an effort to go off with the horse, after he has hired him, it is not theft. I know a case of this kind. it was

Public Menos.

Of Theft.

came to live in Sicily, he was an industrious mechanic, & a very good reader. He was in part conversant with a man in Sicily in making articles on the economy. They had a dispute, & left it to arbitrators. This man hired a horse & went to Sicily & after a time he stayed there 3 or 4 days attending it. And during that time there came a woman with a package for such a man, & claimed to be his wife. She went up to it, as at once as he heard of her arrival, he took the horse & went off, leaving all his property behind, & papers & lying on the table. Now was this theft? No. The circumstances clearly show it was an afterthought.

There are a number of Cases of Theft in Sicily. One of these is a sample of Thieves know that a Countryman had received a quantity of money they were travelling along with him. And at length one of them dismounted & picked up a stone which they suspected was a diamond. The other Thieves said that it was but glass that all these stones were made of. To this the finder agreed. They took it to a Jeweller to be examined, who was also in the post, and he pronounced it to be a diamond of the first water. Now then its value one of the Thieves agreed to take it, & pay the other two their proportion, but not being able to raise y^e money the innocent Countryman said he believed he had money sufficient to pay them thus parting with it himself. He did so & it turned out to be a stone not worth a groat. These fellows were excited for thefts for the benefit of clergy & execution. Another Case. A fellow went into

a store where they sold skin stockings he looked over some
of them, and at last, pretending to be in a great hurry, said
"I will give you a fine pair of these in 1200, pairs of those
over to the snuffers. I wish to have them examined before
I purchase a great quantity." The storekeeper sent them
over, & the fellow took the stockings & went off. This was theft.
They were obtained by fraud - he was convicted & executed.
Now these are cases in which the principle is clear.

But there are cases which seem to puzzle us
with respect to the correct, sentence. These are cases of
Bailment to certain characters - as delivering grain to
a miller for grinding - cloth to a tailor to be made up -
goods to a common carrier to be carried. Now here is no
fraud made up. It is obtain the benefit out - and it there-
by is a bailment. Now if the miller takes double for
the Tailor takes up your cloth, or the Com. Car. runs
off with your goods, according to principle laid down
it being a bailment, it is not theft - and still it is
made theft. Now then do you make a difference
between these & other cases of Bailment? There is a
manifest difference. If you bail a horse, or hire the
bailee obtains the whole control over him, & receives
the benefit - and the bailor has an opportunity to change
his mind - but in the cases above he has only a cer-
tain part - and it is a case of necessity for the bailor
is obliged to employ the miller the to employ the carrier
you must trust when you employ him. These Bailors
have also a lien on the property bailed. The Miller has
a right to his toll - the Tailor, as you see, has

Public Wrongs.

of the 1st.

a right to claim the garment till paid for, making
 and the Con. case. has a lien on the goods, in which case
 in this case it has no lien, but holds it as a bailee, & then
 takes the property, tho' it is originally, & contractually, lent
 to them. This gives rise to the distinction. He again in cases
 where the defendant takes or spends property, as e.g., in
 an action for employment, that might commit, as e.g.,
 a sheep delivered to a shepherd, or goods delivered to a
 steward - now in either of these cases the person has
 nothing but an oversight, but he may be made liable by
 taking them. 1 K. & N. 120. H. & C. 38. 43. H. & C. 72. 110. 114. 116.
 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

That those of Steals from D. and the C. Steals the
 same property from A. - now the Que. is, whether C. is guilty
 of theft, i.e. did C. steal from D.? He is said to have
 stolen from D. and not from A. - why, not from A.? -
 because he had no 'property' in it. He stole it from D. -
 tho' C. took it from A. yet in point of law the property
 was in D. and C. is to be indicted as stealing from D. -

It is a Rule that all crimes are to be tried
 & the indictments brought in the County where the offence
 is committed - as e.g. if one murders another in the County
 of A. he must be tried there & cannot be tried in the
 County of B. - and yet if one steals in the County of A.
 he possibly may be tried in the County of B. This may
 be because the goods were stolen in the County of A. & he
 was taken up in the County of B. and is there
 indicted - in may be tried there. The principle is he
 who stole all the way, & all the time - the act of theft is

continued. But where the act or crime committed is complete in the County where committed the offender can be tried in that County only, as e.g. murder. And in those cases where he may be tried in another County, the property must be shown to that Co. or he cannot be tried there. as e.g. if a man is hurried for stealing a horse & he kills the horse & escapes into another Co. he cannot be tried there. & the Q. of some difficulty has arisen as to Murder. Suppose a man receives a death wound in one Co. & dies in another where is the offender to be tried? Statutes have generally provided that the trial in such case may be in either County.

There must be a felonious taking & "carrying away" The least amount is sufficient to satisfy these words. it is a "carrying away". 1 Hawk 141. There have been some nice Questions up to this. A man went into a field, hid a horse, & hid him one night & was then detected - it was theft - there was an animation. But if he had not moved him out of his tracks, it would not have been theft, for there must be some animation there there would be none. So in the case of the Bishop, where a man took part of the woods out of a Chase (using game) and laid them on the floor, but did not carry them off - he was held to be guilty of theft as to those he had taken out. So where one had nearly cut the piece off a sheep's back but not quite he was held to be guilty of theft - there was a sufficient animation - Rating 318.

There is one case not strictly falling within the definition, because he took the property from a person

but it was not stealing as there was no putting in fear. It was this woman snatched a ring from a lady's ear & dropped it in her hair. It was held to be a sufficient carrying away to constitute theft. Leach 206. The carrying away of goods from one person to another with an intent to steal, is theft. Leach 204. There is one case where a taking of goods was raised, it was upon it and in a perpendicular position, & the person then detected. The Ct. were much divided in their opinion whether this was a sufficient amount to constitute theft. But it is clearly theft according to the principles. There was an intention the value did not occupy the same space as before. Leach 209.

All persons of sufficient discretion may commit theft except in one instance. A wife cannot commit theft on her husband. This principle is established altogether in place of blood. Not because she has any property in the thing, for she has none. It has been said that a taking from the wife after she has taken from her husband is not theft from the husband. I deny this. She has no property in the things she takes, and therefore it is not theft upon her. But the husband has this property & if she takes it, it is theft upon him.

To make it theft the thing taken must be "personal property". It is not theft to take a horse and sell it and send down some driving chains off. There are some nice distinctions to be observed as to the taking of emblements. If you go into a man's field & break his corn & carry it off, or if you take apples from his tree, it is not theft.

Public Records. 1848.

they are attached to the packet. But if the Gen has
been deceived from the stock, or the apples from the trees,
it would be better to leave them off. they are now for
some property not attached to the packet. It is an
evil done once in another time, & is not carrying
them off at the time but comes afterwards & does it. it
is theft. If he had carried them off at the time he would
be in a newspaper. If it is had, pulled & taken care
off the vines & carried them away, it would be a great
only. but if they had been pulled, & covered, it would be
theft. And in each case, in it, with this is the infamy.
The punishment seems to fix the standard. for a man
is to be punished for stealing these, even if he has yet
of them. Still he must be whipped, & this makes him
more scandalous. This is distinct & above an anti-
slavery, but still the right must be observed.

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It is true that cannot be seen without in the
 Session action, as lands notes &c. the they are personal pro-
 perty. They are being used to pay on but the owner
 it was thought there was not much danger of their be-
 ing stolen. That is the rule as above. But by that in
 in the taking & chorus in action is made possible
 as they are in similar Statutes in other countries in most

the U. S. - are none the less, principal than have no negotiable
instrument. Had they been negotiable, that country
have been run right upon them. They would be of use to the
U. S. - March 142, 30 33 & 30 234.

This brings a fuller point than shows in action

Public Wrongs.

of Theft.

were not the subject of theft; the Ru roses were Bank
Notes the subject of theft? They were but evidence of a
debt. Out of abundant caution a Stat. in Eng^d has made
it theft to take Bank notes without warrant, & similar Stat^s
have been made in some the cities and of the U.S. but
without Stat. I am clearly of opinion that they are the
subject of Theft; for they are money, they pass as money,
and money may be stolen in any case where the same
suffices as to money, it suffices as to these the person holding
them, has the absolute title, tho the person of whom he received
them came into possession dishonestly, yet the title of the
subsequent holder cannot be questioned & this for the pur-
pose of giving facility to commerce. Therefore consider
them as a currency, or circulating medium, and on that
ground it is as much theft to steal them (as this without
Stat.) as it would be to steal hard money. We never
had a Stat. in Conn. till 2 or 3 years ago & then it was made
out of abundant caution &c. and does not prove that
they were not subject to theft before its enactment.

There are other kinds of property, on which theft
cannot be committed tho it may be a trespass and these
are such as are called articles of whim - of fancy as
cats, Dogs, monkeys &c. - to take these is not theft, but it
is theft to take cattle, Horses deer on a Park &c. &c.

There is a certain right which is a very im-
portant one in many parts of the Country the incaser of land
will not subject the invader to theft - it stands perhaps on
the footing of Real Property, & men frequently have the
exclusive right, either by occupancy or grant of fishing

Partii Urenas.

Sept. 1.

a certain part of a River. Now if any one should go, and take the fish from this place it would not be theft. It is an invasion of Real Property. it is an incorporation in a covenant. it is no more than to cut down & carry off a Tree. But if one makes a fish Pond in his garden and puts fish in it it was always held, for a third person to take them out. The reason of this distinction is this. in case of fish in a River - the fish are his only while in that certain place. - they are passing & sailing. & when they go above or below the place, over which his prescription or grant extends his property ceases. But when the fish are in a Pond the individual fish are his. his property in them is as absolute as it is in his flock of sheep. & so it is theft to take them. Idem. 144.

I observed a man might steal his own goods.
e.g. Cloth is consigned to a tailor to make up - now he has
the property in the cloth while it remains in his shop for
or not yet he may be guilty of theft in taking it see
(105.13). Hawk 140.

[illegible]

Public Wrongs.

Piracy.

Piracy includes every species of depredation on the high seas, that amounts to felony in any of the before mentioned cases. It is Piracy to board open the Cabin of a Ship to rob a man on the high sea & that public by or private. All that constitutes Burglary, Telling & that same in land are piracy at sea. except that if it is done by an inmate it is not piracy. but it is another offence known in the Admiralty Courts by the name of Embroglio etc. Every must be committed by Persons, who are not the sea or inmates. and it is no matter whether it is done whether it is done publicly or privately but violence or by fraud. Hawk. 112 4 R. 2. 1. 72. 2 Woodd. 2. 421

This crime is recognized by the Laws of Nations of all civilized Countries. & the punishment is death. you must recollect however that the crime must be committed without authority. For if it is authorized by the State or Nations, however inhuman & rascally it may be, still it is not piracy. Throughout all Europe, except in Eng^t. the Culprit is tried by the Admiralty Ct. without Jury. as he was in Eng^t. till the Stat. 22 Hen VIII gave him a trial by Jury as at present. & so we would do in the U. S. by having before explained the names of Robbery, Theft, and Burglary, I have explained Piracy - except that if done on land the latter at law. Piracy cannot be committed if the vessel is within 12 body of the coast. it is then one of the other offences. Murder or Piracy

Public Wrongs.

There are a set of crimes which I shall now relate to you which are breaches of the Peace and are the most heinous Riots, Fools, Unlawful Assemblies, Affrays and Battering.

These are all breaches of the Public Peace. The definition of a Riot is said to embrace all the above in the subject. but still we wish to know of each separately & separately.

The Definition of a Riot is somewhat simple. "It must be a disturbance of the Peace by three or more persons, assembled together of their own heads with an intent mutually to assist each other in every way who will oppose them in their enterprises. They must have some object in view & this object or enterprises must be of a private nature and it must be actually executed - and it is executed in such violent manner as to inspire terror - and that it is immaterial whether the act be lawful or not."

We will consider each branch of the definition, and 1st It must be a disturbance of the Peace - but every disturbance of the Peace is not a Riot for a Riot must be committed by 3 or more persons - 2nd They must assemble of their own heads with an intent mutually to assist each other in every way who will oppose them in their enterprises. To carry off this branch of the definition it is not necessary that they have set out from home with that object in view, for suppose men are in town on a general business day & agree to go and pull down St. Pauls Church, if it has all the other requisites it is a Riot. Again it has been determined that a man may be guilty of a Riot tho he never assembled or has

Public Usings. If this case is not affirmed.

way as if it is met by a parcel of fellows going to pull down
a house. The juries say 31s in pulling a down house
must be guilty of the riot as the rest. 1 How. 293. 4 B. & C. 146.
6 C. 100. 43. 1 B. & C. 293. 2 How. 294.

It must be to execute an enterprise of a private
nature and it must be actually executed. If a 'private na-
ture' means of some private person or his property, if
it is of the public or of public property, it is something more
as rebellion or treason. If the enterprise is only attempted
and then fail to execute it, it is not a riot, but an offence.
I will presently mention - and if they only attempt and
do not attempt to execute it, it is still an offence.
1 S. Ray. 484. 1 Stra. 795. 1 How. 295.

Again it must be done in such a violent manner
as will inspire terror. Suppose a dozen of strange men were
to ride thro' this town, unusually armed & dressed in a savage
like manner. This is no riot. There is no unlawful attempt
to constitute a riot, there must not only be an act done
but violence must be offered and such violence as will
inspire terror. Suppose a number assemble for matters
of sport, throw down an old house which is in the way.
No one is inspired with terror, it is not a riot. It may
be unlawful but it is no riot. 3. Mod. 141. 3 Burr. 1253.
Hob. 91. 10 Ann. 369. 380.

It is not material whether the enterprise be
lawful or not. Now a man has a right to go on his
own land & cut wood. Suppose some person is determined
he shall not exercise this right. Now if he comes
upon his land without assembling a company of men

Public Houses. It is not to be understood that

An Unlawful Assembly is an assembly which
executes, would be a tool, or if attempted to be executed, the
intent. To make it an unlawful assembly there must be
all the other incidents which are necessary to make it a riot,
or a rout except it must not be violent, or the intent, or
attempt to be violent, or the other, or the intent, or the
the man riding thro' town, or a man, or a mob, or a
it is not a tendency to inspire terror, it is an unlawful
assembly. The difference then is this, a riot must be exe-
cuted, a rout must be attempted to be executed, but there
is nothing of these to constitute an Unlawful Assembly.
4 B.C. 140. 1 Hawk. 247.

But how can it be an Unlawful Assembly, where
the persons do not assemble to commit a riot or rout,
at that time. Under this head it has been determined that
persons meeting to consult whether they will or will not
afterwards devise ways & means, is an unlawful assembly.
It is so, that that may be an unlawful assembly, if there
is no attempt to do anything which is not to be done or done.
Hob. 92. 1 Salk. 394. 1 Vent. 369. 350.

Under this head it is necessary to notice, that when several
men together to defend a man or men from applicants, when there
is just reason to fear an attack as from a mob, or if they do not
use uncommon weapons, or a petition a peaceful manner, it is not
an unlawful assembly. It must not however be in a manner that
will inspire terror. If a man suspects an attack from a mob he may
always assemble his friends to defend him, or to defend him with a bayonet,
or they have a right to do something to defend him, as he is allowed
to do himself. 5 Co. 11. 11 Mod. 116.

Public Wrongs. If a man does an unlawful act, he is

liable to a fine or jail, but not to a punishment as if he did the same thing, differing only in degree. And any public officer without warrant has a right to stop these offenders. He has the same right to call out the posse comitatus as if he had a warrant, & they must obey him. This is a power given him from the necessity of cases - the slow progress of law would be inefficient. In other cases, the officer must act upon a warrant from a magistrate. There are frequently Statutes made by the Legislature - if then in the reading of the riot act they do not disapprove, they are subject to greater punishment. No one private person or persons have a right to put a stop to it if they can. Sec. 121. 4 & 5.

The C. & P. punishment for riots was fine, Imprisonment, and Whipping. For the other offences, fine & imprisonment. Most of the States & Colonies have similar Statutes regulating the punishment. You are referred to those for the punishment.

There is also the offence of Public Offence. This does not require 3 persons. One may commit an offence. It differs from a rioting only in this - it must be done on the view of some persons & a calling men to secret. It may be a French word, signifying Terror. It is of little importance to make a distinction between them. It arises in the first place from the difference in the punishment - for formerly the punishment for an offence was fine & imprisonment. For a rioting it was only fine. 4 & 5. 145.

Public Wrongs.

Sec. 6. April 26th 1813.

Beside those offences already considered, as Riots, Raids &c there are those of breaches of the peace, which have no other name, except they are sometimes called Treaspass vs. the Public.

Threatening may be a breach of the Peace, without any beating at all, if done in a tumultuous manner - or a challenge to fight. Or any other thing which tends to excite public alarm & disturb the peace & tranquillity of Society. The C.D. punishment is fines, & Statutes have made no other provision. You are not to understand by this that every quarrel, or dispute is a breach of the Peace - but if the persons conduct in a tumultuous, offensive manner, which gives reasonable ground for alarm it is a breach of the Peace. Daring one out to fight, threatening to beat another, and it appears that the quarrel will be stop'd by the interposition of magistrates only, tho they do not fight, is a breach of the peace. So it always is a breach of the Peace when the Parties come to blows - for which an action lies. It now amounts to a Battery, & the injured individual is entitled to Damages. So if it is attempt to beat, it is an assault for which the person assaulted has a remedy. But for insults merely, no action will lie.

When an injury is done to an individual in consequence of a Riot, Raids &c. the individual has an action to redress that injury, and the Rioters &c. are liable over to the public likewise for the breach of the Peace and the private action is not, nor was it ever merged

Public Wrongs. Breaches of the Peace.

in the public prosecution. There is no forfeiture in this case for the public offence and the doctrine of merger applies to those cases only when the goods & chattels are forfeited, in consequence of which the possibility of a separate action for the private injury, is removed. The issue is all the injury arising from an Assault - and for this the action lies. And in those cases a very fallacious argument is often used in Court by Lawyers. When an offender is tried in the private action, for the battery, for example - the Judge & Council will often tell the Jury they should give great & exemplary Damages, on account of the breach of the Peace, & the atrocity of the offence as the Laws of Society. This is fallacious reasoning. The public will take care of themselves - and if the Jury should give the individual greater Damages than he has sustained on account of the breach of public Law, it would be punishing him twice for the same offence. For all the Damages to the Individual be ever so great, it is no bar to the public prosecution. Suppose e.g. the Law punishes a man \$100 for a Riot. & A. has been injured to the amount of 200\$. But the Jury give \$300 on account of the public offence. Now the rioters have been punished to the extent of their guilt, but still the public have a right of action as they have punished him still 100\$ more. This is over & above what justice demands. Vindictive Damages should never be recovered in these cases. There are cases where the Law does not punish the offence, as e.g. in Ranson, but gives an action to the injured individual. In such case there is more reason

Public Wrongs. Branches of the Peace.

for paying the public damage should be given to the Individuals. But in cases, where the Law does provide for the offence, vindictive damages should never be given to the Individuals. He will recover his damages, and the jury ought not to be conscientious in giving something as small money, as it is termed. The insult, the character of the person, the unreasonableness of the demand, the time, place &c. are all to be considered.

Barreny.

By Barreny here, I do not mean the Barreny, treated of in the Merchantile Law. It is there some misnomer in the character of vessel where it is a distinct offence.

A Person is a Barrator who vexes others with unjust, needless and frequent lawsuits - and also he is a Barrator who stirs up others for lawsuits, & induces them to sue. 1 Hawk 524. 4 Bl. C. 184.

In order to subject a person under the first branch of the definition (i.e. vexing others with unjust needless frequent suits) it seems the bringing on such suit will not subject him as a Barrator - but a second such suit will render him liable. But under the latter branch of the definition (i.e. stirring up others to sue) he is guilty of Barreny if he once stirs up others to sue. We are not to understand that, because a man fails in his suit he is ipso facto guilty of barreny for if every unsuccessful plaintiff w^d. be guilty of the crime. No, it must be apparent that the object originally was to vex - and he must have known that he had no right in Law or Equity to recover. as if conscious he was no cause of

Public Wrongs

Barratry.

actions, & it brings an action as a Barratry. knowing it will ruin others. this is Barratry. So also if the suit is not to great by spleen or spite it is barratry. Suppose a man tells another, when in good conscience, he will know he is not entitled to a recovery, but conceals that some man just will give him his case is this barratry? No. For altho, however contrary it may be to the principles of justice, yet if the Law declares for him, he is entitled to the benefit of the Law - on this ground it is that application is frequently made to the Court that the rigor of the Law may be abated in this favor. If C. D. the individual is allowed an action to recover the damages he has sustained in consequence of this vexatious Law suit. In Conn. by Stat. the individual is allowed triple damages - but all our cases do not seem to square with this. I would never myself say it was Barratry, unless it was vexatious.

A Law suit will subject the person to Barratry not only when it is vexatious and without foundation - but also it may be barratry, when there is a right of action, owing to the manner in which the suit is brought. As if a man has a debt and demands for 400 and he takes out a writ demanding 500. Now had the Debt been declared to in a reasonable sum, he might have procured bail - but owing to the great demand in the judge's writ, he cannot procure a bond - man & is committed - this is barratry. He makes use of the Law as a cloak to gratify his malice, & put it out of the way of any hardship & trouble. So also under

Public Wrongs.

of Garraty.

own attachment. I am in error. The property is liable in satisfaction of debts. Suppose then he had taken property of the value of 500 £ on a lien and had sold and distributed it by depriving him of his Home & Const. this is using them improperly. & he is liable for a vexatious lawsuit. The his action is not without some foundation.

I have known some cases where the Ct. took upon themselves to presume the plaintiff knew he had no cause of action, & upon this discharged the suit ^{and} vexatious, but it appears to me that the suit was not lost so much as to get money &c. e.g. a woman had been charged with theft which affected her character & point of chastity, & the circumstances were such that she must have known it was all true. However she lost her action for slander, and it turned out in the trial that she was not entitled in any way to the money said in slander afterwards paid her for a vexatious lawsuit, on the ground that she knew she had no cause of action. Now it can hardly be conceived that she lost her action for the purpose of vexing & marring herself, for knowing she had no cause of action she must have been sensible it would have terminated in her shame & disgrace. Now it is more probable to me, that she supposed she could recover a sum of money, & obtain a verdict in her favor which would clear her character. For my own part I do not believe it was a vexatious lawsuit. The Judge decided it was not, but the Court of Errors reversed the decision by a majority of ones. The

Public Wrongs.

J. Barratry.

The Punishment for Barratry when committed at the suit of the Public is very severe. It subjects to fine, imprisonment, and a consequence of the conviction is, that it prohibits the person from ever again testifying in a Court of Justice. It is the crimen falsi, and under our Statute the offender may be bound over for his good behaviour, and perhaps the C.D. would do the same. doubtless. Another offence is that of

ChamPERTY.

This is an offence at C.D. "It is the buying up of other lawsuits or quarrels." At C.D. it includes any security as notes, bonds, &c. on any thing on which an action is to be founded, but usage has subverted this part of the C.D. The man, in the course of trade, buys bonds, notes &c. is not guilty of this offence, tho' formerly he was, on the ground that every man was to take care of his own case & furthermore it was thought the practice was productive of litigation. But if this is the object (i.e. litigation &c.) it is Champerty. As if A. being rich buys a note or bond for the purpose of suing him & putting him to trouble & bringing his family to want, on any such unjustifiable motive, it is Champerty. It never was Champerty to buy or negotiate instruments. The distinction is to be considered to distinguish this offence from what it once was. Suppose a man without any particular spite or wish to vex, buys up notes as his neighbours, not in the course of trade, at 18/ on the Pound, and

Public Wrongs.

of Champerty.

then sues them - they mortgage their farms by & by comes a foreclosure - now he is guilty of Champerty. This point is however a disputed one, but I think the B. D. is not other-
 wise, and by B. D. it was Champerty to buy these instruments with an intent to sue. If however they are bought up for the purpose of speculation merely, & no intention to have them sued, it is not Champerty by y^e Common or Statute Law. Negotiable instruments are not included, these may be bought & sold at pleasure, and for any object. 5 B. C. 135. 1 Chan 545.

There is one species of Champerty which stands upon a distinct ground - which originates from what Lord Coke calls "Pretensions titles" i. e. buying disputed titles to Land. By a "pretended title" is not meant one which is void, but one in dispute, tho it may eventually turn out to be a good title. It is where the person in possession claims the land by one title, & another out of possession claims it by a distinct title. Now the man out of possession cannot sell ^{his} title, without being guilty of this offence - and here it is wholly immaterial whether his title is good or bad. He however may sell to the person in possession for this settles the matter at once - but to sell to any other will tend to increase the quarrel - at least to produce litigation. At B. D. if a person sold his title as above, the deed was wholly void - so that if the person buying such title, were to sue the one in possession of the land, the Def. might show if he could that the p^lff acquired all the title he had from one out of possession, and in such case the

Heff could not recover, tho in fact his right be 7: better title - besides all this, the person is subjected to a fine at 2:2. The practice of buying & selling pretended titles became so mischievous to society that they made a Stat. in Eng^d. which in quaint language subjects the seller of such title to a fine, & to one half the value of the Land as a penalty. This Stat. was passed in 7: reign of Hen. VIII. and it may be doubted whether it does not operate here. But be that as it may it does not reach to the offence - it only gives an accumulative remedy. The Stat. above has been copied in this & some other of the States. - It is supposed that the man in possession claims by title - that he is not a mere trespasser. (Plow. 80 to 88 all 7:2 saw on this latter page.)

A Qu. of another kind has grown out of this of considerable magnitude - It is whether the mortgagee, being out of possession & another in, claiming by title, can sell the mortgage? The Qu. came up in this way - A mortgaged his farm to B for 1000th borrowed money - B. was to reconvey the Land to A when he (A) paid 7: money (7: was when being stipulated) Before the time of payment arrived C. got into poss. by a distinct title - Then A got the money to pay the Mortgage B. - B. received the money & reconveyed the Land to A. Now the Qu. was whether B's conveyance to A being made when he (B.) was out of possession was void? The true ground I take to be this - a mortgage is not real property - it is a chose in action, as much as a bond is, & therefore not within the purview of the

Public Wrongs.

Of Champerty.

Statute. Suppose a man makes a will attested only by 2 witnesses, in which he gives all his mortgages to A. Now a will to pass real property must be subscribed by at least 3 witnesses but this will is good, the mortgages will pass under it. How? Because two witnesses are sufficient to a will passing personal property. The money lent is the thing & that is personal property. - Again, mortgages do not pass under a will under the terms "lands, tenements & hereditaments" except in the single case where the Testator had no other but mortgaged lands - and then they pass, for the intention of the Testator can operate on nothing else. From this it is evident that mortgages are not Real property. They are a mere chose in action and in all cases where a chose in action may be conveyed, a mortgage may be conveyed too and of this opinion was eventually a majority of the Court. Court decision.

Of Usury.

Usury is a crime subjecting the taker of it to punishment, as well as to a forfeiture of the obligation. Usury is of 2 kinds. One where a man "reserves in his obligation more than he lends" as if he lends \$90 & takes a note for 100⁰⁰ - this is what is called usury *vis usury*. This is no crime, no offence punishable by the Laws of society. It is true, if this can be proved his note is void, but he cannot be punished for it.

The other species of Usury is "receiving too much". Suppose e.g. A. lends B. 100⁰⁰ in reality, and at 6% interest.

Public Wrongs.

Applbury.

and on the day of payment the obligor comes & wishes to keep it longer, & the obligee is willing provided he will pay him 12 p. Cent. Interest. and he pays it. he has now received too much. This is the crime for which the man may be prosecuted. But you will observe this kind of usury does not make the note or obligation void: there is no corruption in the instrument. When you reserve too much interest, your obligation is void but you are liable to no penalty - but if you receive too much, your note is good but you are subject to a penalty. This is the distinction. No Contract to receive, if not received subject to the penalty - there is locus penitentiae. occurs when received.

Suppose the contract is to take 12 p. Cent. Interest, but the obligee receives only simple interest - and y. note does not follow up the penal contract, i.e. it is given for the sum lent & lawful interest only. now is this note void? This Qu. arose in my practice & we could find no decisions in point, tho some analogous. The lawyer engaged with me in the cause wrote to Mr. East the Eng. Reporter. He returned for answer, that he knew no such case, but he sent us Justice Buller's opinion in which he cited cases and said it was usurious. I doubt this says the Judges.

A man may subject himself to the penalty & the obligation be void too. e.g. Suppose one lends \$100 and takes a note for 1000. now this note is void & nothing can serve it - but the obligor has incurred no penalty as yet. Well suppose at the end of the year

Public Wrongs.

Of Usury.

the obligor comes & pays 88 interest - now when the obligor receives that he incurs the penalty, - he has received too much - he lent but 90 & he has received the interest on 100 - this subjects him to the penalty, & reserving too much the note is void. But the obligor may not be all this, danger by refusing to receive the lawful interest on 90, & only, & ~~refuse~~

Lect^r 7th April 27th 1813.

When in the subject of Usury yesterday, I did not intend going into the subject any farther than to explain how it was a crime. The English Statute most of the Stat's in the U. S. & this crime subjects the transgressor to a forfeiture of double the value. The same Stat. differs from the Eng^l only in the punishment - it subjects him to the full value by way of Penalty, & a forfeiture of the obligation. Suppose at the end of the year the obligor receives 12 p^{ct} intst. Now there is no doubt but this is a crime, but is it obligation void? There is no ground for saying that it is void, unless it was agreed at y^e time the money was lent, that the obligor sh^d receive this unlawful interest. The receiving 12 p^{ct} intst is not conclusive evidence that the contract was usurious when made - it may be an afterthought, i.e. the taking 12 p^{ct} intst. There is no doubt but the receiver is subjected to the Penalty, & liable for the breach of the Laws of Society.

There is a *Questio* *veritata* growing out of this - e.g. Suppose a man lends money upon a Premium - the Q^{ue} is whether that Premium being received by the

Public Wrongs.

Of Usury.

Lender consummates the offence of receiving too much?
 E.g. One comes to another to borrow money, say 100[£].
 B. refuses to lend his ^{money} unless A will give him a Premium
 of two half pence. A pays this premium and B. lends
 the money. By taking the premium he is guilty of receiving
 more at the end of the year. A. comes and makes a payment
 to just the amount of principal & interest. Now there is
 no offence. But suppose he pays one dollar more, has
 he now committed the offence? That depends on the point
 of light. Was the Premium paid? If so.
 Say he has received no more than interest in money.
 he has not incurred the penalty. But does he not
 incur the Penalty if so the obligation is good. The
 true point of light I conceive to be this. B. is not guilty
 of the offence, but the obligation is void. There is too much
 reserved - for what difference does it make to A. whether
 B. gives him 100[£]. or 100[£]. or whether he (B.) gives A.
 100[£] and then A. puts his hand in his pocket & returns to
 the 2 half pence - This however is a legal question. Different
 opinions are to be found upon it in the different States,
 & different opinions in the same States. For y. subject of
 Usury. see Com. Dig. & Bac. ab. tit. Usury. & Hawk. Usury.

There have been some cases

Public Wrongs. Of Libel.

The nature of a Libel depends as respects the injury to the individual, upon the facts, and constitutes the title of Private Wrongs.

But Libel is also an offence against the public. In considering this offence some observations which now seem applicable to the private wrong will necessarily be necessary. It differs from Slander, which is defaming a man's character by Speech, in a variety of cases. A Libel must be in writing, printing, or some other permanent form, as is a Libel, it is written but many things which written are Libels, which by Speech are not Slanders. E.g. charging a man with lying is not Slander - there is no punishment for lying. But charge a man with theft & it is Slander. The criterion is this: if you charge a man with such a crime as, if true, would subject him to punishment, it is Slander. Therefore it would not be Slander to call a woman a whore in any place or Eng^l & Capt is Slander in London only is she punished for the crime. But no such distinction as this exists, as to Libels. To publish a man as a liar, or any other thing which in the view of society would render him scandalous, is a Libel, & the person liable to an action at C.D. A rule was laid down in 2 Wils 403, which has never since been contradicted, that publishing "whatever has a tendency to render a man ridiculous in society is a Libel". In the private action, there never has been any doubt, you may prove the words ^{published} spoken to be true, and this is a good defence. There

Public Wrongs.

Libel.

There are two kinds of Libels considered as offences. One is a Libel on a private person, and the other is a Libel on the Government. These are both offences, but standing on entirely distinct grounds. I mention this because it is a subject which has not been well understood, & concerning which some very ridiculous laws have been passed.

1st As to a Libel on a private person. I have already observed, that that would be a Libel when reduced to writing, which if spoken by parol would not be a Libel. For a Libel on any person the Libeller is guilty of an offence and on the public prosecution you can not prove the words true - and here the public prosecution differs from the private action. But why are you not allowed to give the truth in evidence? It is because the public prosecution is not brought with any reference to the injury done the individuals character, but for the disturbance of the public quiet. The person libelled will be as apt to revenge himself on the Libeller when the words are true as he would if false. It tends to induce people to quarrel, to break the peace & disturb the community - on this ground it is an offence & it is no defence to the Libeller at the suit of a public prosecutor to say the words spoken were true.

Suppose a man's memory is libelled - as if a person revives the character of another who is dead & ridiculous by publishing something respecting him. This is an offence - the truth cannot be given in evidence on the public prosecution. The reason here is y^e same.

Public Libels.

of Libels.

The writer whether true or false will run to wrong the
anger, passions of the friends of the deceased, and they
will be induced to revenge, in a manner and way the in-
fant stirred to the memory of a Father or a Brother. The
peace & tranquillity of society is endangered in conse-
quence of it - and for this the Libeller will be punished.
Public quiet alone is the ground on which the prince-
ple is established. Beside the public prosecution -
the individual is entitled to his action - but when the
Libeller is brought to the truth of the words is a good place.

There is another set of Libels which proceed
upon a distinct ground, and that is -

"1st When the Government, or Administration
did more libel, &c. You suppose that the contrary
Doctors have laid down some rules on this subject
which are unsupplied by cases. I have no doubt
but the truth of the facts stated, may be given as evi-
dence, - but what is the ground on which they say this
shall not be allowed? It is, say they, because it
tends to bring the Government into disrepute, & therefore
true or false, makes no difference. No tendency to bring
the public peace. If this principle is carried its full
length, no public measures or proceedings of the Govt.
can ever be described with a view to censure. Thus
it ever has been understood in Eng^d or this Country, that
the Citizens were precluded the privilege of publish-
ing their opinions of the measures or conduct of Govt.
We have known repeated instances in Eng^d of pro-
secutions for Libels on Government; but never one where

their charges have been punished for that which was
 mere matter of opinion - however unjust & unfounded
 that opinion might be, or from whatever impure
 & incorrect source it might have been drawn. This
 reason why the truth should be allowed to be given in
 evidence on a prosecution for a libel on government
 is very different from that on case of a libel on an
 individual. In the latter case it evidently indu-
 ces the individual to chastise the libeller instead of
 waiting the slow progress of the law for satisfaction,
 and in doing this the peace of society is broken - but
 no one would conceive that the administration of jus-
 tice would go about the streets punishing all who have auda-
 city enough to ridicule them - The peace of society is
 not, on the least, in danger in the latter case, & from
 this arises the distinction.

What constitutes a libel on government? What
 is true with what is not true is a libel. When
 in considering the measures of government have a right
 to express their opinion that they are unjust, & speak
 in it. But in doing this there is no necessity to charge
 them with having acted corruptly. I know it is often
 done, & there is no doubt but the person doing it is
 a liar. There is a sort of presumption juris, which
 cannot be contradicted, that the administration of gov-
 ernment in their offices without corrupt designs. To
 charge them with those, is a crime - and in this case
 of the subject, it is wholly needless to press & allow
 ing the truth to be given in evidence under general

Public Wrongs.

Dr. Libels.

if true for it was so at S. S. I believe there are no cases to be found which go further than this. That is the person can prove the charge made to be true. He is not liable unless he charges the Administration with corrupt motives & conduct. The Government would be absolute indeed who by law should establish a different principle. The Libelion Law so much complained of altered the truth to be given in evidence. This was a provision inserted in that act which I conceive was unnecessary as it would not be prevented according to justice & equity - the principles of the B. C. It was inserted out of abundant caution to silence all Du. upon the subject.

The punishment of a Libeller is fine imprisonment & as the case may be Pillory, and in case of being convicted of a Libel on Government, they are compelled to find sureties for his keeping the peace. And at the discretion of the Ct. he may be compelled to do this when the Libel is on a private person. 4 B. C. 158 & on W. 1 Hawk. 352 & on W.

There are certain writings holden to be Libels which are not Libels on individuals or on the Government. These are Libels on Virtue. I mean certain Books having a mischievous tendency. I mean those Books where a subject was discussed falsely however contrary to the truth it might be, which would be considered a Libel on virtue. Suppose we should publish a work in which paganism was inculcated as being the only true religion, & the subject falsely discussed the author would not be subjected as a Libeller on virtue. What then is it? It is where in the writing men are ascribed to the

Public Wrongs.

of Libels.

present a certain vicious practice or encourage to
break the laws of society. Such as are calculated to lead
youth from the paths of virtue. This Libel must be
published? till that is done it is no crime. If the auth-
or's Desk e.g. is broken open & such writings found there
it is no publication. no offence in law.

Q. It has arisen also what is a publication?
A. write a Libel to B charging him with crimes?
Now it was contended this was not a Libel, because
it was not published. But the C. decided it was a
sufficient publication, for it has the same mischief
contending that it would have had it it had been
published in the newspapers. that is, it incites B. to go
& give a severe caning - a consequence of which
in peace of society would be disturbed; which was the
very thing intended to be prevented.

It is also said that all persons repeating the
Libel are publishers. But this will not always be
true. Suppose the Libel is published in a newspaper
& a man reads it to his family it is no publication.
This is common, & shows no evil intention to injure.
But suppose he puts the paper in his pocket & reads
to the family reading it to all he sees, & spreads
the story far & wide, he is no doubt a Libeller himself.
His object is now plain, he intends to do all in his power
to give the Libel a circulation - it is to injure. Suppose
you see the rule above is not universal. It depends upon
the circumstances attending the fact, whether it is a pub-
lication or not.

Q

Public Wrongs. Of Cheating.

Cheating is not only a private injury, but it is sometimes a public offence. The distinction is this. If a man gets a bargain out of you by false representations, concealment of circumstances &c. it is a private injury only, for which you have a remedy by action. But it is no offence. But if in this case he sh^d. make use of an artifice to get a bargain out of you it is a cheating, for which he is entitled to be punished. E.g. Suppose I sh^d. a poor sneaking fellow in Ditchfield should procure an elegant suit of clothes & horse & go to New York, and there sell himself for Col. John Jones and owing to his appearance the merchants there sh^d. give him credit. It is a cheating - & he may be prosecuted for it. So carrying letters

it is cheating & very frequently theft now.

So also if he sells by false weights and measures, it is a public offence - it is cheating.

The Punishment is pretty severe - it is fine, imprisonment, pillory, & sometimes whipping and branding, besides for his good behaviour. In the common ordinary cheating there is no public offence.

Public Wrongs.

(F. Adultery.)

The crime of Adultery was not punished by Y.C.D. of England. It was an offence cognizable only by the Ecclesiastical Court, which punished it with Excommunication, & then the C.D. also St. P. in it declared the person to be an incompetent witness in all courts of Justice, & excluded him from the collection of his debts. But we have no Ecc. Courts in U.S. - it is so, then Adultery is no offence at all, so that - of course it is no crime in U.S. unless made so by Statute. We have a Stat. which has given rise to the well known phrase of 'Conjugal Adultery.' By this Stat. a distinction is made like this. If the crime com. is with a married woman, whether she was or is married or not it is adultery. but if a woman is now married it is not adultery whether the man is married or not. It is another offence differently punished. The reason of the distinction is said to be, that it is more important the woman should be chaste than that the husband should be, because by her continence she might impose upon her a spurious issue. The punishment of this crime is by the old Y.C.D. a system of penance, which has a ridiculous much ridicule & mirth, but which I have no doubt was admirably adapted to the government of the society at the time they were made. To say the least of them, the sage legislators by whom they were made, were undoubtedly men of strong minds & independent virtue. By this Law the person convicted of Adultery is to be branded with the letter A. - The

Public Wrongs.

Of Adultery.

she is to wear a halter till noon, then necks outside of the clothes so long as they remain in the State, as power is given to all justices of the peace to order the convict. 30 stripes if he is going without his halter, & this as often as he offends by putting it off. This is now the punishment as I have known some free convicts - but never knew a convict to stay in the State any longer than he could travel out of it, which is the thing most wished for. Adultery as a private injury is considered under the title of "private Wrongs." In Criminal Law by adultery we mean only the crime. Con. of a married woman - but as a private injury or cause of divorce, either Husb. or wife, may commit it.

Bigamy.

This is where the Husband or wife have another Husb. or wife living. It was once considered a terrible offence, as it was punished with death. But this is done away in Eng^d by Stat. which inflicts a mild punishment. Our Stat. punishes this crime the same as adultery. After 7 years absence of the Husb. or wife, unlearned, it is no offence to marry again, on the ground that it is presumed the person absent is dead. I have known but few cases. There was one where a woman married after a 7 years absence of her Husb. unlearned - it was considered it was Bigamy, because she ought to have procured a divorce before she married a second time but the jury under direction of the Court acquitted her. It was fair to presume he was dead. 1806.

Public Wrongs.

Section 3rd. April 28th 1813.

There is no offence made so by a very ancient Stat. in Eng^d which Stat. Statutes have been copied into our Statutes in the United States. Our ancestors adopted this Stat. as they did the 11th & 12th I mention this because I am aware it in reality makes no difference whether there is a Stat. on this subject or not. The offence I mean is that of

Forcible Entry & Detainer.

Now this by the Stat. was no crime. Forcible Entries & Detainers accorded exactly with the military spirit of the ancient Lords. They were accustomed to land with their respective vassals, & decide by the sword those questions, which are now decided by Courts of Justice. Of course when a dispute arose between two of them as to their rights to a certain tract of land possession was to be obtained & kept only by the intervention of armed forces. The mischief produced by these domestic quarrels became so great that it produced a Statute to it. so that persons out of possession were prevented from gaining possession, however good their title might be or against the detainer. It put real estate upon the same footing with personal property & subjected the person who attempted to gain a possession by force to fine & imprisonment. Under this Statute some cases have arisen.

It must be such force as is calculated to endanger person. I am however doing a good forcibly to obtain possession and here I would observe that it makes no

A Public Wrong. Forcible Entry & Detainer

no difference whether the person claiming has a good title or not. it is a forcible entry.

If Forcible Detainer is where a man keeps possession in the same forcible manner when he has no title. The owner of property may oppose force to a person who attempts to disturb his possession & enter by force, but if he does not resist but is in possession without title, he is liable to the penalty of the Stat. if he detains. The owner, in attempting to enter by force is also liable, so that the wrong done is perhaps on the owner's side may both be subjected.

It is true if A is in possession of B's property by agreement, & has been allowed to hold over his term, he is allowed to defend the property if called upon suddenly to leave - he is entitled to reasonable notice. Suppose J. S. shuts up his house to go on journey and on his return he finds T. in possession - and this without any claim of title. Now T. may not enter by force, i.e. by breaking down the door, & put A. out. But suppose T. does go in by force & put A. out. Now A. may call a particular kind of Court who try the Case, whether T. used force to obtain the possession - if so they will give A. the possession again. But they try no Case as to the title. The parties are left to try the title at Law, and A. may be subjected for a forcible entry, & liable for a forcible detainer to the penalty the Statute is guilty. Co. Lit. 256. 1 Pra 443. 2 S. Ray. 1514. Crof. 199.

This is a Law of policy altogether made to preserve the peace & tranquillity of Society, to which all

Public Wrongs. Forcible Entry & Detainer.

the rights of individuals are lost to sight. The governing principle then must be sought and the equality of particular cases is to be thrown out of view, & general justice enforced. For it is better that an individual should suffer till he can obtain his remedy at law, than that the whole community should be disturbed in his attempts to do himself justice in a more forcible manner.

Of Treason.

There is much run on in Eng^d relating to treason with which we have nothing to do. as treason is to the King and his royal family. Be it treason there to interrupt his Poer on the ground that it is defying his majesty in arms. but with this we have nothing to do. no farther concern than with any other historical fact. I shall therefore omit taking notice at all of this part of the subject.

There are two cases however which require some attention. Is it treason in Eng^d to levy war on the King & his council on the same principle it is treason in US to levy war on the government of the United States. As to the 2^d whether it can be treason to levy war on an individual State I shall make no remarks. one thing I think is certain that that will be treason in a State which it is treason in an individual as if the State of Conn. sh^d declare war on the State of New York, it would be treason in the signatories of this State. for the State of N. Y. is a component part of the whole Union & entitled to protection.

Public Wrongs.

Of Treason.

This 'levying war' is an attempt to raise troops for the purpose of overthrowing the Government. They need not be actually on foot, but they must go into the business. To suppose the object is to change Government, into a different form of proceedings, than the one they are pursuing - is that it is treason to attempt to remove by force grievances which they say the Government is just upon them - and in doing this it makes no difference as to the manner in which this object is to be obtained, by force or compulsion.

An act was passed in Engl^d granting to Papists certain privileges to which they had long been denied but which they, as good Citizens were entitled to as a right to devise property &c. Some demagogues collected together a band of desperadoes, whose professed object was to compel Parliament to repeal that Law. Now this was treason for it was an attempt to compel the Government to alter a Law & this by force. To suppose it becomes necessary in the Government to make use of force to quell a band of men whose object is to constrain the Gov^t to alter any of its Laws, it is treason. There may be cases where the Government is so arbitrary & oppressive that the Citizens will rise and establish one more suited to just. Having succeeded all will acknowledge it a most glorious Revolution & the authors entitled to the admiration of the World & if had they failed, they would have been denounced as Traitors & executed as such.

There may be very great Quarrels which will

Public Wrongs.

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not an error to transfer. i.e. where the object is not to overthrow the Govt. or alter the Laws. E.g. Towns sometimes get into violent quarrels, so the Factors in a Seaport will often declare war on the Students in College &c. the boys of course will all turn out to fight the boys of some Town. Now these are never treason for the object on which, with very unjustifiable, is not treasonable.

It is said the object must also be universal. This in a certain sense is true. E.g. after the Toleration act was eng'd a party got together for the purpose of pulling down all dissenting houses but had no design to injure Churches. Now it was contended to make this treason, its object should have been to pull down all houses of public worship. But the Court decided it was treason.

The other species of treason, is adhering to the enemies of the Land and this whether the Enemy be a public or whether it be a private Enemy. Adhering to them is furnishing them with arms and munitions, provisions, or giving them any aid or comfort. This is treason. So sending them intelligence is treason.

It has been contended that when a rebel has fled out of the Government that it is treason in all who who afford him aid or comfort. But it is not so. He would undoubtedly be treason to furnish him with means to carry on the war - not to supply the wants of his family of nature it be as an act of humanity. Not treason. See 100 years 1780 37. 132 to 136. Foster 211, 219. It

Public Wrongs.

Treason.

It is still difficult to learn from elementary law, precisely what is & what is not treason. The Stat. 25 Edw. 3. defines in some measure what it is. then says "and there are things not there enumerated which are treason." Suppose the Supreme magistrate is an usurper - but he is the magistrate de facto - now is it to us or to obey him? It has been decided it is not.

And therefore treasons committed vs Hen VI. were punished under Edw IV. tho all the line of Lancaster had been previously declared usurpers by an act of Parliament. But the more rightful heir of the crown or "king de jure" & not de facto, who hath never had plenary possession of the Throne, as was the case of the House of York, during the three Reigns of the line of Lancaster, is not a King within this Stat. vs whom treasons may be committed. 4 B.C. 77. 3 Inst. 7. 1 Hale P.C. 104.

Words never constitute treason. (when spoken of the King they do. 4 B.C. 77. 3 Inst. 7. 1 Hale P.C. 104.)

With respect to the proving of Treason, we are told that 2 witnesses are requisite to produce a conviction, whereas the C.D. does not require but one, provided other facts are proved, which can not be supposed to exist, unless the principal fact exists. It appears to be settled that when it says "2 witnesses are requisite", it is not meant that every overt act is to be proved by 2 witnesses. One witness in each overt act is sufficient. but if there is but one overt act laid, this must be proved by 2 witnesses. So it is said a wife may be compelled to testify vs her husband when indicted.

indicted for Treason. I took it for granted for a long time that this was true on the ground as they say, that the rights of the Public are of more consequence than individual considerations. But I have looked thro' the state trials & have been unable to find a case where this proposition is proved, and therefore I do not believe the state can be compelled to testify in a case of Treason, where this would mean any more than in other cases.

Offences vs. Religion.

In Eng^d there are two offences vs Religion which do not exist in the United States. These are what they call Apostasy & Heresy. There are no Apostates or Heretics in our country. There are certain crimes however vs Religion which are punishable. The principle which governs in these cases why they are punished at all, is on account of the disturbance they produce in society. They are not to be punished according to the nature of the offence in the opinions of men, or on the sight of God. With respect to any religious opinions men may & maintain they are entitled in those opinions, & are allowed to worship according to the dictates of their own consciences. If a set of men should choose to sacrifice to justify & declare this as the only true religion it would be arbitrary & improper to restrain them by law. There was once a time when the minds of people were bigotted, that they conceived the established Church was the only acceptable manner of worshipping God & that all those who were opposed to them, or who did not conform

Publick Writings. Differences wth Religion.

to their views of Religion were fit subjects to be offered up as an atonement to an atoned deity. But the sentiments of the people on this subject have been entirely changed. Now all are allowed to worship God as seen with him best, & as sit under his own vine & fig tree without any one to molest or make him afraid. But notwithstanding the present liberality of y^e Christian world in this particular there are offences which are punished by the laws & society. Such as

Blasphemy. Blasphemy with us is the same as it is in Eng^d. In all cases where we accept the word of the English Statutes, we adopt their construction. Thus when a Stat. is made vs Blasphemy, it is such blasphemy the covering of which is contained in the Stat. Authorities. What is Blasphemy? Denying the being of a God, his overruling providence, contumacious reproach of Christ, scoffing at his holy scriptures. These are all Blasphemy. But in considering this it has never been understood, that questioning the divine character of Christ, or denying the scriptures to be true, was Blasphemy. The opinions of men are not to be restrained. But scoffing at the scriptures, reproaching Christ's character is blasphemy for it is unnecessary - it occasions uneasiness in the minds of hearers. But the rights of conscience & the privileges of investigation in a sober & rational manner are not to be restrained. much less are men to be punished in such cases. But if one should deny the existence of a God, or should publish that Christ was a poor

Public Wrongs.

Offences vs Religion.

more infamous character & it would be blasphemous & punishable. It is perfectly just to restrain such conduct by Law, at the same time. I should now say that a Law was a good one which in any degree restrained the rights of thinking. Again, persons cannot be prevented from worshipping God in their own manner. If a certain sect should conceive it their duty to glorify God, the women with spinning wheels and the men with axes, they would have a right so to do. But if they should carry their wheels & their axes into Parson Beecher's meeting house on the Sabbath, & should thus begin to worship God in their own way they might be restrained. You see then, the Law will have nothing to do with religious questions of any kind, till the community at large are disturbed, or thrown into unnecessary uneasiness by the conduct of others. But still, the rights of conscience are not to be violated.

There is one thing which has entirely disappeared since the punishment of it has been abolished. I mean witchcraft. This was formerly considered as a most heinous offence vs religion, punishable with death. And so long as it was considered a crime & the punishment of it lasted, there were witches in abundance. But as soon as we were allowed the privilege of becoming witches & wizards, & this without fear of the Law, as it had decided to punish the offence, the profession died away and the number of it expired.

Religious

Public Wrongs.

Offences vs Religion.

Religious imposture is an offence & punishable. By this is meant such persons as palming pretend an extraordinary commission from heaven, or testify the people with false denunciations of judgments. Those pretending to subvert all religion by bringing it into contempt & ridicule, are liable to fines imprisonment & sometimes pillory.

Originally the religious societies in Conn^t were all formed according to one plan, and on the ground that all the citizens were of one denomination, the ministers were supported by taxes to be appropriated as were the inhabitants. But as new denominations rose up it was found just & necessary to exempt them from the payment of taxes to the support of the established order. But in order to rid themselves of this obligation they are obliged to register their names on the Town Clerk's Books, mentioning the denomination to which they belong. If it is found that persons do this merely as a cloak to get rid of paying taxes, & do not attend divine worship any where when an opportunity offers, they will derive no benefit from it.

Profanation of the Sabbath is also an offence vs religion. The tranquility of this day has always been considered as entitled to the protection of the Law in every civilized country? What is a profanation of the Sabbath? The Statutes in the several States have regulated the manner in which this day is to be kept. Unnecessary labor, recreation & amusements are forbidden. Securities, ^{as} notes bonds &c are

Public Wrongs.

to the end of the world.

void when entered into on Sunday. The maxim, *quod est iuris dominicus non est iudicium*.

Profane swearing is another offence. Profane swearing is no where exactly defined. It must be an oath by something. If God's name is not called upon, it is profane swearing to call upon God. If this is not done, it must be a cursing, which is also undefined. We can conceive what it is to be a cursing, but it is not easy to explain it. It would not be a cursing, but putting the offender to a punishment or affliction. If a sailor on meeting an old friend or fellow sailor should say, "God damn your soul Jack how are you?" for it is his chance to one if he did not in his heart choose to denounce him blessed rather than damned. It is calling on God's name unnecessarily. I doubt whether it is to be considered swearing profanely, to swear by Jupiter, unless the person swearing considered Jupiter as his God. If so, he has no business to take his name in vain.

Lect. 4th. April 19th 1813.

Of Homicide.

I do not think it possible to get a correct idea of Homicide from any definition we have or use. If we have the cases to be found in the books, ascertain the principle contained in them, & make some observations on those principles, & apply them to our own Criminal Code in this particular. I think we may gather a correct idea of Homicide.

Homicide is sometimes murder, sometimes manslaughter, sometimes excusable & sometimes justifiable.

Public Utterances.

Of Homicide.

I shall make some general observations before I enter particularly upon the different branches of homicide.

To constitute murder, it is necessary the killing be with malice. By malice something different is meant from a spirit of ill will merely. It is better explained by the Latin word *malitia*, which means malice in the abstract, than by the English word malice. There may be a total absence of a spirit of ill will, & yet the person guilty of murder - so also there may be a presence of ill will & the crime fall short of murder. Now a man may be guilty of the murder of his best & dearest friends, & without any sensible malice to that person. This happens when the act done awakens the insocial heart, one bent on mischief, and when nothing, even the life of a fellow creature, is sufficient to restrain him from carrying his designs into execution. As if a man should wilfully drive a cart over a child who required to get out of the road, & kills it. - it is murder. - it shows an insocial heart - one wholly regardless of the lives of his fellow creatures. and it is just best to be cut off from society. There are some cases of artificial murder, where the *malus animus* is not discoverable, but where the Law, thro motives of policy has declared them to be murder. But where this *malus animus* does not exist, either in fact or in presumption of Law, it is not murder.

Manslaughter differs from Murder. & is of two kinds - voluntary, & involuntary. Voluntary manslaughter is where a person kills with an intent to kill, & so

Public Murders.

Of Homicide.

some great bodily harm. It must be supposed to occasioned by some violent provocations. You will observe then that it is near manslaughter, when there is evidence of revenge as if after the provocations the just seems have had time to cool. Now if the person kills it is murder. Let the provocation be ever so great. It now shows the criminal motives. the wicked heart. when if he had killed at the moment of provocation, it is not so apparent that he is so wicked that he ought to be cut off from society. And if the provocation is such, as is in the opinion of the Court a slight one, & the person takes advantage of his occasion the death of another, it is murder. Whether the provocation is sufficient to excuse or not must be left for the determination of the jury. This voluntary manslaughter then is where the person killing intends to kill or do some great bodily harm which occasions death upon violent provocations.

The other kind of manslaughter is involuntary, & from the last very different. It is where one kills another while performing an unlawful act, or by performing a lawful act in an unlawful careless manner. E.g. suppose one thro' sport shd. open his door & discharge a gun at the upper corner of the room, & by accident some one hit his arm & the charge lodges in one of your heads. Now this is not murder, for there is no malice. It is not voluntary manslaughter for there was no provocation. But in committing a rash unlawful act, it is involuntary manslaughter.

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Again suppose a watchman in a place where but few were passing should throw a brick from a house where a person - now it is his duty to look about to see if any one will be in danger but if he does not, & kills another, it is manslaughter of this second grade. He was about a lawful act, but in a careless manner.

Homicide is sometimes excusable, which is of two kinds. Excusable homicide of one kind is this, when it is done for self preservation. This is called homicide "de defensione". as if in a quarrel a man's life or limb is in danger & he has done every thing in his power to prevent the quarrel, he is excused if he kills the assailant. But the great question is, did he do everything in his power to prevent the quarrel. Now it may be murder, manslaughter, or excusable homicide. If he had an old grudge to the person who assaulted him & he takes this opportunity to revenge himself, it is murder - if he is violently attacked, and refuses to retreat as far as he can it may be manslaughter of one kind or the other - but if he has done all in his power to avoid the quarrel & attempts to escape, & it is in danger of losing his life or sustaining great bodily injury, he is excusable if he kills the assailant.

There may be cases where you need not retreat one inch, but are excused if you kill the person on the spot. as if he attempts to break into or burn your house, or to commit a rape. The person in such case may defend themselves and the assailant may be killed.

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The other kind of excusable homicide is where the killing is not done in self defence, but where there is some circumstance by which death ensues. It is sometimes called chance medley, but usually homicide by misadventure. Suppose a man is cutting wood at the door, & another person sitting near is killed by the head of axe flying off. Now this may be wholly excusable as if it had never come off before, but it may be manslaughter, as if the one had been in the habit of coming off before.

Homicide is sometimes justifiable. As where it becomes the duty ^{of the Sheriff} to execute the laws of the land by detaining a person, convicted of a crime, of life. So he is justified in killing thieves, or persons who will not be taken, ~~without~~ provided he cannot otherwise take them. So in case of riots mobs &c. he is justified in killing the rioters if he cannot otherwise quell them. But in all these cases there must be an apparent necessity on the part of the officer. If after the officer has taken the person & has him in his power, he yet beat & kill him it is murder.

There was a case where a child ran into a hayman & concealed himself under the hay. The man in pitching hay for his cattle ran the fork into the child & killed it. Now this was not murder, for there was no malice, it was not voluntary manslaughter for there was no intent to kill. nor is it involuntary manslaughter for he was pursuing a lawful act with ordinary care. What is it? It is no crime at all.

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It is homicide by misadventure. So too the case of the
 a man flying off & killing a horse, it is excus-
 ble homicide by misadventure. But suppose it was
 accustomed to fly off the handle, & he knew it - now
 this would be manslaughter of the 2^d grade. he was
 pursuing a lawful act, but in a careless manner.

The case was A shot at his neighbors sheep
 with an intent to steal them, but missed the sheep
 & killed a man - was it murder? No for there was no
 malice - was it voluntary manslaughter? No, for
 there was no intent nor any provocation. but it
 was involuntary manslaughter, for he was pursu-
 ing an unlawful act. There is a distinction in Eng.
 which says that if the person was about an act
 which if committed would be felony, & in doing this sh. kill
 a man however unintentionally it is murder. Now
 I apprehend this distinction does not hold in this country.
 The governing principle which determines when homicide
 is murder (i.e. the malicious malice) is entirely lost
 sight of, and the symmetry of the law on the subject
 very much marred. Suppose a man goes into a neigh-
 bors field & shoots his horse, it is a trespass for which
 he is amenable to the injured individual merely. But
 suppose he goes to steal a sheep & in shooting at him
 a man is killed. now say they in the latter case he is
 guilty of murder. But the malicious malice is certainly
 as much wanting in the sheep stealer, as in the horse
 killer & perhaps more so, for he may be driven by po-
 verty to steal the sheep, to feed a starving family, whereas

no other man would have induced him to do in it the crime - but this consideration can never be brought in favor of the person who diabolically goes about killing his neighbour's house. So I conceive the distinction unjust & unbounded in principle.

The case of a man shooting at a partridge, & accidentally killing another person. it is not murder, for there was no malicious animus - no voluntary manslaughter, for there was no intent no any provocation - nor is it involuntary manslaughter for he was pursuing a lawful act with ordinary care. But in Eng^d if he had no right to shoot at a partridge, it ~~is~~ ^{is not} be murder. But it is not so here. So long as one is killed in wrestling & the game is conducted fairly, i.e. according to the rules of wrestling & it is permitted by Law it is no crime - it is homicide by misadventure.

But suppose the amusement is unlawful as e.g. it is unlawful to play at cock fight, or to throw at cocks &c. now if any person is killed in such amusement, it is involuntary manslaughter for the most that can be said about it is, that the person was pursuing an unlawful act.

Suppose a man intends attack another with a large cudgel, & having hit him kills him - ^{is} What is y^e crime? It certainly is not excusable homicide, but there is sufficient evidence that his intention was not to kill, but only to beat - it is involuntary manslaughter, for there was an intention to do some great

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harm; nor is it voluntary manslaughter, for he has no provocations. What then is it? The law says if a man used furnishes evidence of the unsocial heart, that he is regarded as the enemy of his fellow creatures, & that therefore he ought to be cut off from society as a murderer. So if one, on a slight provocation as by having been made the butt of the company, &c. take up a large stone & throw it into the midst of them, whereby a person is killed, it will be murder - the unsocial heart is plainly discoverable. The case was a man pulled a chair from under another, & the fall occasioned the death of the person. It was neither murder nor voluntary manslaughter, but it was involuntary manslaughter for the act was unintentional - & again the reason was this. A did an act, what had it killed B. as he intended it should he would have been guilty of murder. Now suppose it killed C. it is murder. The criminal's malice is there - as if he says you see for A. & B. takes it. Now he is guilty of the murder of B. - But suppose A. in the last case had been so provoked by B. that if he had killed him (B.) it would have been only manslaughter and he accidentally & unintentionally killed C. is it murder. It has been decided that it is only voluntary manslaughter, for the malice animus is no more apparent in his killing C. than it will be, had he killed B. Take the schoolmaster's case - e.g. a boy has behaved improperly, the master corrects him some improper, or improper manner or with a proper correction. But one of the

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Sticks is the occasion of his death. Now the master having provided properly in all respects & having a discretion to use the rod, he is guilty of no crime? But suppose he took a weapon a little too large what is it? He is nothing more nor less than involuntary manslaughter - he was punishing a lawful act, but in a careless manner. But suppose to all appearance he was as calm as a clock, - and struck the very wrong head with a pair of tongs - & killed him it is murder. So if the workman or a house gives notice to all below to have a care, & unfortunately kills one it is no crime - it is homicide by misadventure. Suppose he is at work when people seldom pass, and does not give notice, it is manslaughter of the 2^d grade. If it were in a city where people were continually passing, & should give the notice it may be murder. He shows the unsocial heart.

Upon this principle it is, that, if a busman holds to be murder to turn out a rick (Bull), in consequence of which some person is killed. He shows himself totally regardless of the lives of men. So when a man draws the charge from his gun & some person soon after loads it, without his knowledge. In showing the excellence of his piece, he snuffs it & unfortunately kills his wife. It was not intended to be murder, but was it manslaughter? If the principles I have laid down are correct, it is no crime at all; he was about a lawful act, & used ordinary care. See that case in Foster's B.

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Mr. Kirk laid down in the Books as it respects homicide that it is at times a Court of Justice an officer should execute a person and the Ct. not have jurisdiction over the crime, that it is murder in the officer. But I do not believe this will always hold true. He acts in obedience to the Ct. and presumes they are authorized to direct. He had no malus animus. The Court, if they have misapprehended their jurisdiction are not guilty of murder, but only of manslaughter - it may be manslaughter in the officer, for great negligence. But suppose the Ct. knew they had no jurisdiction & ordered the man hung before he had an opportunity of procuring a reference from the Governor - the Court ought all to be hanged.

Is too it is said to be murder in the officer to execute a man, differently from the manner prescribed? but I do not believe it - there is no malus animus - indeed this case has been contradicted of Cal.

Sept. 10th April 30th 1813.

I yesterday mentioned a case where one man shot his wife - there is another case standing upon the same ground. The case was a man took up a pistol to pull the ramrod into the barrel to see if it was loaded - the ramrod went down, but the fact was, it was too short - he snapt the pistol, it went off & killed a bye stander. It was not murder nor voluntary manslaughter - but was it involuntary manslaughter? It turns upon the Qu. was there any care used? Foster thinks it was excusable homicide - for a man.

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man of ordinary sense would have been secured when he found the road went down. I believe this a correct opinion and that there are few men who would have had it occurred to them to see if the road was too short.

With respect to an officer, who in taking a man kills him, I have already observed that if the officer used violence after he had got the man into his power, the murder would be discovered. But there are cases where the officer is excused in killing his prisoner who is in his power, as if the prisoner attempts to escape. There is a distinction in this subject which I do not believe will be found. It is contended that if the prisoner succeeds in getting away, the officer may shoot at him (say) if he kills him, it is excusable homicide - but if he is accused of trespass it is not. I see no reason in the distinction.

Homicide de defensione rests upon the principle of self defence, namely if it becomes necessary for one to kill another to save himself it is reasonable. The person attacked may in some cases kill & retreat, without attempting to escape or retreating, one inch. In other cases it may be manslaughter, at least if he kills without attempting to get out of the way. He ought always to retreat, if by so doing he can avoid the danger. Those cases where he is not bound to retreat are of what a man attempts to rob him, to break into his house, to burn it or to commit a rape &c. in all such cases the person is excused by immediately giving the fatal blow. So in a

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Sudden murder, if the assailant comes upon him so violently that he cannot escape without great danger he is excused if he kills him. But if on being assailed he does not retreat as far as he can, he may be guilty of murder or manslaughter according to the nature of the case.

Suppose the person first assaulting joins himself in the most dangerous, & turns & the person first assaulted pursues him - now he must retreat as far as he can before he may kill & then be in imminent danger. There have been cases where A has assaulted B, knowing that thereby the passions of B. will be roused, and B turns upon A, & A retreats & finally kills B. now if this was the intention of A. at the time he made the assault, he is guilty of murder - he has the malus animus.

Of Manslaughter. I have observed there were two kinds of manslaughter. The first where A kills B. in a quarrel or with an intent to kill or do some great bodily harm, having a great provocation the other where a person kills another while pursuing an unlawful act, or a lawful act. but in a careless manner. I observed to you that it was no matter how great the provocation was, if it has had time to cool. Now it is not because he was in a great passion that he is excused. Suppose on a trifles a man throws himself into a violent passion & kills another, he is not excused - it is not an aggravation of the offence - it is a diabolical phrensy - but if he has been greatly

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provoked & in the moment of heat & passion gives the fatal blow, the Law is willing to cast a veil over the imperfections of mankind, & say it is only manslaughter. This provocation then is a mitigation of the offence.

So words, nor gestures nor any other actions with expressions of contempt, will ever be a sufficient provocation to allow one to kill another. Such killing will be murder. Still a man may be so provoked with words & gestures &c. that he may kill. & still it will be only manslaughter. But these are cases where there was no intent to kill. - if there was the intent, it is murder. Eg. Suppose A insults & provokes B. by accusing him of crimes &c. and B. takes a stick or a hand-spike & beats A's brains out it is murder - but instead of doing this, suppose he takes a whip, or any other weapon which is no probability of occasioning death, but kills him without any such intentions, it is manslaughter - the intent here is collected from the nature of the weapon used.

I will now mention some cases. A boy had been caught stealing wood in a park. The parker tied the boy to the flint's tail & rode off with him & killed him - it was holden to be murder. It shows a spirit too diabolical to be suffered to live in Society. Another case where two boys fought, one of the boys came home with a bloody nose, the Father was pursuing the other boy 3/4 of a mile without catching him, & on returning home the boy was killed - it was holden to be manslaughter only. But

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But, this decision has been condemned by almost every subsequent writer. The case is reported in different books. In one book I have seen it related that the Father pursued the boy with "a little whip." Now if this ^{was the} case, it is not likely he intended to kill, and I am inclined to believe this was the ground on which the decision was made. Still in this case, there may be said to have been malice, for his anger had had time to cool in going the distance he did go.

What then are the cases? The most common cases are these where a man is violently attacked. So if a man should find another whipping his wife or children it would be a sufficient provocation. So if a man should find another in bed with his wife & sh^d immediately take his life, it would be manslaughter only - but if after giving his passions time to cool, he sh^d grow more angry & then kill him, it w^d be murder. This convinces the malice animus.

There are likewise some cases of artificial murder where thro motives of policy the principle of malice is lost sight of & laid out of view - as e.g. the use of duels. Now men frequently are compelled to engage in duels by the fashion of the country; their situation in life, & a false notion of honor they go into the field & shoot their opponent, without the least malice or ill will - they engage in the act with great reluctance - but still it is thro policy made murder, in order to prevent men from exposing their lives in this ridiculous & dangerous manner. So too the case of prisoners killing

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an Officer in attempting to escape, tho without the
real intention, is by the policy of the same made mur-
der, on the ground that it will operate as a prevent-
ative to persons to resist the laws. These are cases
standing on a distinct principle, & may be consider-
ed as exceptions to the general rule.

The punishment of murder is death. The pun-
ishment of manslaughter is fine, imprisonment, &
branding in the hand with the letter M. In most coun-
tries the punishment of both grades of manslaugh-
ter is alike - i.e. they may be fined, imprisoned &c. but
it will be more severely inflicted in one case than
in the other, according to the circumstances - the spe-
cies of the punishment is the same. Our Stat. only
inflicts a fine for involuntary manslaughter.

On a Trial for murder, the Jury can find
the Criminal not guilty of murder, but guilty of
manslaughter. A curious question has arisen under
our Statute. Suppose a man is indicted for mur-
der & the Jury find him guilty of manslaughter -
which is meant, manslaughter of the first or second
grade? If it is to be considered that voluntary
manslaughter is meant the punishment will be
fine &c. and branding, and if involuntary it will
only fine. How are the J. to determine which pun-
ishment to inflict? As a Court they cannot judge
from the facts testified to the as private men they
may know which he is guilty of. Now it appears
to me which it is - the punishment for involuntary

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murder ought to be the one. If they inflict a punishment for voluntary manslaughter, they do not know but they inflict too much. There have been, however, a long course of decisions the other way. The Qu. was never decided till a few years ago, when the Co. found the precedents so numerous that they thought it dangerous to overrule them. This consideration will have no influence upon me, for however important the maxims of stare decisis may be, yet I would not hesitate to decide according to principles of Law however ~~commonly~~ numerous the decisions might be to the contrary.

When I mentioned that it was murder for prisoners to kill officers in attempting to escape I forgot to tell you, that if any private persons were killed in this way, it was manslaughter merely, unless such persons are commanded by the officer to assist then they are acting under authority & the killing of them is murder, tho' done without malice or design. As this subject generally you may see 4 Bl. C. Hale P. C. Hawk P. C. and Foster Crown Law. 1001 11th. Nov. 1818.

There is a prohibition by the name of con-
plaint, which is made by a person in common law
known, to a magistrate or some officer, the object of which is
to compel another person to enter into bonds that he will
Keep the Peace. This is quite different from compounding
for Robt. Schmitts. It is also provided by Act that the
person in connection shall not be liable to any punishment.

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So far, both principles of the law, a man may be bound
for his past behaviour where the punishment is by fine.
This is essential to all courts of law, & especially of the Justice.

There are other cases where the person may be
compelled to obtain security for his future good conduct. This
relates to cases of violence where the person has been vio-
lent, or of a violent disposition, but has been convicted. There are other
cases, where a magistrate, with such as high authority
as a Justice of the Peace, may require a person
to give security for his future conduct. If a Magistrate shall
see persons in the street stripping, or shall see any other
one, to right, or shall see persons going about armed, or
armed? he may issue a warrant to have such per-
sons brought before him, & then he may compel them to give
security to keep the peace. The bond so compelled to give
is not intended as a punishment but only as a pledge
that the person's tranquillity of society shall not be
disturbed. A bond in this case is entered into, when
the magistrate thinks of who takes the bond sees the dan-
ger there is that the peace is about to be broken. There-
fore the words of the magistrate may take such and such
view. There are other cases where the person may
be bound to keep the peace, & the danger of its being
broken was no concern of the magistrate. In this
case there must be a warrant from the person
& the Justice of the Peace, & proof of the fact, & on
production he may then, if he sees fit, put the person
under bond to keep the peace. That power is not assumed
for in general the offence is the first place brought

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before competent authority, the person injured & punished according to his deserts. It is usual to sue when a person is in fear of his wife, limbs or some bodily harm. The person fearing such injury has a right to get a warrant & bring the person before competent authority & have him put under bonds to keep the peace. This warrant must be founded on a complaint in the name of the person, which complaint must be made under oath that he is in fear of such injury. Now the question is, whether the person shall be put under bonds or not, there are always 2 questions, whether the complainant is in fear. There must be the opinion of the magistrate, because for fear. A man of weak nerves may have great alarms & fears of injury, when another of ordinary firmness would have no apprehensions. Now this weak man must bear the fear in common with his other infirmities, and the justice will not put the person under bonds. These complaints most usually come either from husbands or wives, commonly the latter, who either fear their lives or in danger from the other. In this case the wife or husband has a right to swear as the husband (or wife) who is ordinary, cases they cannot be witnesses either for or against each other, & tell on what grounds they have fears that the other will injure them - and the reason why in this case they are allowed to be witnesses is, that the course of conduct which induces an intention to injure is generally known to themselves only. The story of the wife is always that she & husband

Pettie Urenes.

in the presence of witnesses create her own peril, and when they were alone he threatened to take her life, that he threatened her & finally that he kicked her out of bed, &c. Now these being injuries which are unknown to the parties themselves, she could not procure a writ to be put under bonds, unless she were allowed a divorce. It is true there may be some hazard in admitting this oath as a woman may be so intimidated ^{by her oath} as to compel a peaceful husband to be put under bonds. But the character of the wife is open for observation.

The authority to bind for good behavior has its foundation in an ancient statute. Edw. 3.rd Previous to this there was no such thing as binding for good behavior, but only to keep ye peace which was a C. D. principle. Since this it has been extended to extend to all punishable cases. It is held that a man may be bound for his good behavior, whenever he has been guilty of a breach or violation of the law. Jurisdiction of the Peace extends only to the commission of a certain outrage but under a writ for good behavior all breaches of the law are comprehended. So that bond for good behavior is vastly more extensive than one to keep the peace. Some of the words made use of in that act, are very singular. It reads thus The King may bind to good behavior all persons of that fame such as those who keep the houses all night watch & are keepers & all such who keep awake, nights & sleep in ye daytime.

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and are common street rascals and such as throw man-
carts into ponds in the night." Then the generosity of
the terms this statute is construed to relate to all tra-
versers of the law as turning over horse blocks &c has
been decided to be within the meaning of the last clause.
"as if it" and unknown man carts into ponds in the night."

And as persons may be bound to keep y^e peace,
so under this act, it has been determined, they may
be bound for their good behavior, at Court. A person
was brought before a Court to give bonds for his good be-
havior because he was a vagabond. The law was
who was a vagabond? The Judge gave this definition
of his character. "He is a person who no man know-
eth - ^{5th} he doth come up, no whether he goeth." He was
a fit person to be bound for his good behavior. So
in the time of Craik's insurrection in Hampshire the
many persons who were attached to his cause came
into this State for the purpose of an insurrection.
were bound at that time & later & later and apprehen-
dised many of them as vagabonds. They had been
guilty of no specific crimes which it be proved to them
but their object was generally well known. The
Court compelled them to give bonds for their good behavior.

The judgment of the Court is, that the person pro-
vide bonds in a certain sum, conditioned that if he be
have himself according to law, as long as time that
the bonds are to be void - but if he commit any breach
in violation of law they are to be forfeited, and these
bonds are of that nature that they cannot be ^{otherwise}

Putti U. N. O. S.

Chancellor - he is now put into the hands of his bondsman who has the same power over him, that bondsman has in other cases over their principal. If he does not give bonds, he stands committed till the prisoner be compliant with. How long is this to last. There is no time specified in the King's warrant, and from your favor of it, it may appear that the imprisonment is to be perpetual, unless bonds are procured. But this is not the case for the report of Jeffries, which is with us, the same thing, County Court now power to discharge the person. The magistrate taking the bond, or before when the bond is, is bound to certify up all cases of this kind and have before him during the vacation, or since the last session of year. The person must stand on with till the Ct. do it, or if bonds are given, they must be in power till then.

When the Ct. sits, they examine the cause, & if they don't find the will discharge the bondsman or the person from prison - but if they think there is still ground for fear in the person procuring the bonds, they will continue the same non est to Court. If application is made to a Justice of the Peace to lay the Qu. of necessity to impose bonds upon him, & he refuses to do it, the Superior Ct. will issue a writ habeas corpus to do his duty in this particular.

This bond is discharged by the death of either of the parties, or by the release of the person procuring it, or whenever the cause for which it was taken into was considered or decided & it has been before the Court. It is

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always for any breach of the peace whatever. The old form of the bond was to keep the peace towards all, but it is now towards all good citizens of the State especially the State. A Bond for good behavior is, not in any breach of the peace. Suppose it is made penal to cut down a tree, & the person bound incurs this penalty, is the bond forfeited? No, it does not relate to this. But if the person bound commits theft or swears, the bond is forfeited. It has been held that reproachful words will not occasion a forfeiture of the bond - the reason is, that such words are not punishable if spoken by Parole.

It is not necessary that a man should fight to occasion a forfeiture - reproachful words will not occasion a forfeiture, but if the person bound challenges another to fight, or raises any great tumult whereby the peace is in danger of being broken, the bond is forfeited. There is a case of this kind - a man was under bonds to keep the peace, he got into a quarrel - but said I will not fight, for if I do my conduct will be justified, nor can I challenge to fight for the same reason - but said, here "if you dare knock this chip off my shoulder" - it was held to be a challenge to fight, & the bond forfeited.

There is another principle by which persons may be committed to prison - 1st If a person insult the C. or 2^d If he refuse to obey their orders, for either of these he may be committed to prison. This power is incident to every C. - The first is to preserve the peace & dignity

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of the Court. But it is a commitment in that & main purpose merely, & lasts only, while that cause sits. If a justice is insulted, or a disturbance while trying a cause, he may commit the person to the Court or some court is usually in a free house of the County or Supreme Court commits it lastly till the release of the Court which may be two or 3 weeks.

A commitment for interfering is otherwise done if the C. is a very different thing. it will last forever as long as the person stays sooner. If he can't comply, because the time for the performance has passed e.g. or it has otherwise become impossible, they commit him for a limited time. Suppose e.g. a Town Clerk refuses to receive a deed, and the Superior Ct. issues a peremptory mandamus ordering him to record it & he still refuses they will commit him, which commitment lasts till he obeys & complies with. But if he has been ordered to do a thing the performance of which has become impossible, or it was proposed would be of no use, they will issue an attachment to him, & he will be confined as long as you cause specify. So that the person is entitled to a Bail. Sheriffs & factors may be liable to an attachment when other citizens would not be liable. This is the ground of their being officers of the Ct. and to make themselves liable is a contempt of the Ct. as e.g. if the Justice should abuse a prisoner, or a sheriff, or a publican compel a man to pay double rates they are not only liable to the party who suffers by such

Public Offices.

conduct - but they being important officers of the Ct. it leads to many legal proceedings and Cts. of Justice into great Contempt, & for this they may be punished. So also an Attorney is liable to this, if he conducts in an extraordinary manner for they are officers of the Court. So also a Juror who is not an officer, but only a member of the Ct. for the time being may be punished in the same way if they misbehave themselves - as if on Summons they refuse to appear, or refuse to be sworn when there, or take bribes. Such conduct is always a Contempt of the Court, & they may be committed for a limited time. So if a witness refuse to be put under oath, or bring on an oath refuse to testify, he is liable to a commitment. I know a case of this kind - a man was examined as a witness, & he refused to swear - because he said his evidence would be in favor of the J.B. & he did not like him. The Ct. informed him of his danger & threatened to send him to jail if he did not testify. The witness said he did not care, for he was taken from jail on a habeas corpus ad testificandum, & could not procure bail, so had no objections to their sending him there, for he had got to go at all events. The Ct. found themselves disarmed of their power at once & were glad to get from him by coaxing what they had attempted by threats.

Now this extends to all cases of a rule of Ct. as if two persons, by a rule of Ct. agree to abide the award of arbitrators - now if either of them refuse

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to abide, the Ct. on information of that fact, will commit him till he complies with the award; for it is a contempt, as he engages before the Ct. to abide the award.

The mode of proceeding upon these things is very summary. The Ct. by word of mouth tells the Sheriff to carry that person who has abused y^e Ct. to jail, & there keep him till the Ct. rises. There is no need of any warrant, unless it be provided that the officer who carries a person to jail shall have a mittimus, as evidence to the jail, or that he is bound to receive & keep such prisoner. In some States, it is contrary to law for the jailer to confine a prisoner unless the officer proves his authority by a mittimus from some Magistrate. But the order to commit is perfect by word of mouth, & the mittimus is only evidence of the order.

Suppose a complaint is made to the Court stating certain facts, by which the Ct. ascertains there has been a contempt. Now the Ct. issues a summons, ordering the person to appear to answer the complaint. Suppose he makes a default of appearance, i.e. will not obey the summons then the Court issues a warrant to commanding the officer to commit him to jail. But suppose he does appear & shows a reason why he did not abide the award, - as that it was obtained by surprise - & prays to then be summoned to try this fact. Now

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Now if the jury find there was corruption, the Ct. discharge him. If they find the award was good, they condemn him till he performs the same. As soon as he appears in court he is in their custody & cannot go free, then unless he gets bail. So also he is bound to answer all interrogatories put to him. Now as to Oath? He cannot be compelled to do this. The principle is established on the ground that he has obligated himself before the Ct. to abide the award.

So it was formerly that if on being called up on he could swear himself clear the Ct. must stop the proceedings & could not add it evidence to show his oath untrue. e.g. suppose the Sup. Ct. sh. issue a peremptory mandamus to a Clerk to record a deed. Now if he would come into court & swear to us of fact which w^d. excuse him, as if he would swear that the deed was never delivered to him to record it would discharge him altho it might be a notorious falsehood. But he would be liable to the pains & penalties of perjury. By the Stat. of Anne however, this defence to the mandamus may be put in issue & tried. It is a principle of Ct. that in all cases where your case depends upon the oath of the adverse party, who is called upon to testify, that oath is conclusive, tho false. But under the Stat. of Anne it is different. Some States have copied this Stat. & others have adopted the practice which has grown up under it. But when it is not adopted the old principle obtains. 17 How 142. 18 How 185. 1 Palk 384. 18 How 444. 544. 6 Alled 73. M. B.

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Bail in Criminal Cases.

With respect to Bail in civil cases we have nothing to do in this place - it is considered under another title.

There are some offences which are not bailable: the more offences are of such a nature that they may be bailed: What is meant by Bail? It is being enticed into by another person, conditioned that the person for whom it is given, shall appear at the next court to answer the offence. If he does not appear the bond is forfeited & he is in the power of the bondsman. The forfeiture of the bond however, is no acquittal. the person may be taken again & tried he after. It does not come in competition with the offence nor does it prevent him from testifying if called upon the perhaps if he were convicted of the crime for which he is bailed, he would be rendered legally infamous.

The bondsman can at any time release the principal & carry him to the justice's deliver him up & thereby discharge himself from his liability. In the first the justice will now order him to commit to custody he procures other bail. As to the person bailing, has a right to release him in another State. It may occur to you that there is a difficulty in taking the principal in another State because the warrants of one State are of no effect in another. But there is no difficulty about it. A man has a right to release his property wherever

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Mail.

he can find it. If A. takes B.'s horse & runs away with him into the State of New York, B. may recover this horse. So in case A. builds B. and B. escapes into N. Y. A may go there & take him by force and bring him back - on this respect. A has a lien upon B. he is A's property - and as evidence of his ownership A carries along with him a writing called a "Mail price". This is of no authority at all, but furnishes evidence to the inhabitants that B. is A's man. When if he had not this evidence they would rise & rob him. B. Hale P. C. 96.

By the ancient C. L. of Eng. all offences were bailable except homicide, & this exception was supposed to be introduced by Stat. 4 H. 2. c. 29. 12. 67. 2. What are, & what are not bailable offences, you must refer to the Statutes in the several States. Anderson 12. 77. Rev. 209. After conviction there is no offence bailable.

Notwithstanding homicide was not bailable at C. L. - nor was treason after commitment; yet it is true that the Supreme Court may bail in some cases. They may bail for those offences, when the authority committing them (e. g. the Justice) has no liberty to give bail. Hale 48. 2d ed. 12. 5th ed. 323.

By Eng. Statutes, treason, arson, & all offences which the prisoner before the C. C. confesses to have committed, are not bailable. Neither in any case, can the person be admitted to bail, after verdict & before judgment rendered. (Breaking of prisons, thieving, &c.)

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of Bail.

openly known & notorious (as it is very regularly & properly) will not be admitted to bail. Rule 121. Whether all these are copied in y^e American Stat? I do not know.

I observe in no person after conviction. B. to bail. B. to this rule is this general exception. If the person so convicted of a crime, is, in the opinion of physicians, in danger of dying in consequence of his confinement, he may be bailed, to be returned to prison on the restoration of health. It has been said that if the prisoner is the cause of his ill health by his own wicked conduct (as when he stabbed himself) that he sh^d. not be bailed. But the principles of humanity are of equal force as strong here as in other cases. & he ought to be bailed. The Supreme Ct. use great caution in bailing where the person is committed for murder. I know a case where by violent misadventure one occasioned y^e death of another - he was tried before the Justice, & he committed him for murder. In a case of this kind the Sup. Ct. will grant bail. 1 Buls 35, 5 C. 110 & 455.

The proceedings on an indictment by informations are governed according to the practice in y^e several States, and can be treated as any other practice of Courts.

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Of the nature of crimes That branch of the municipal law which treats of crimes is sometimes called criminal law. Sometimes also it is termed public wrongs. It is termed by these several denominations, because crimes are the subject of which it treats: the Crown, or King, the Prosecutor for offences against it: and the public the party whose rights are thereby violated.

The term Public Wrongs includes all crimes and misdemeanours against the Municipal Law and under the terms crimes & misdemeanours are included all offences against that Law, i.e. Crime or Misdemeanour is the commission of an act in violation of a public Law forbidding that act: or the omission of an act in violation of a public Law commanding that act. A.B. 5.

Crimes & Misdemeanours are strictly synonymous: but in common usage the word Crimes denotes offences of a higher and more atrocious nature than are signified by misdemeanours. C.

A crime or misdemeanour is an infraction of a public right inherent in the whole Community in its social and collective Capacity. A private Wrong or civil Injury is the infraction of the right of an individual in his individual Capacity. It is true however that almost every public Wrong includes a civil injury. e.g. Murder, Burglary & Battery are public Wrongs each of which includes a civil injury. A.B. 5-6.

But more positive offences, offences mala in se only, do not necessarily include a private Wrong, e.g. a common nuisance may include no civil injury, a Libel of a dead person can include no civil injury.

As it is a principle of Law that every injury shall have a remedy: it is therefore the object of the Law to give every public offence that includes a civil injury to give a twofold remedy: first-

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first - to redress the infraction of public right, & secondly the civil injury against the individual. 4 Bl 7.

Doctrine of Merger: It is not always the case however that the Individual can have his action to redress the civil injury occasioned by a public offence: for it is regularly true at Common Law, that where the offence amounts to Felony that the civil injury is merged therein. 4 Bl 5-6 Bul. 131 1 Mod. 283 - 2 Roll. 557.

The doctrine of Merger has been said by some to be founded on the policy of the Law, to prevent, as much as possible, crimes from escaping punishment. 3 T. R. 146.

The only true ground of this doctrine is that the claims of the public, absorb all the means of satisfaction to the individual, by the requisition of both the person & property of the Criminal: and there being the only funds out of which any injury can be redressed, that to the individual must of course in such case be without remedy: as the rights of the public are by Law always preferred to those of an individual: Hence, as in felonies, it is generally true that both the property & the person of the felon are necessary to satisfy the public claims, the civil injury is without remedy; or, as it is expressed in the books, is merged in the public offence. 4 Bl 6 Stro. 873 Ld Ray. 1572.

Where a felon was sentenced to transportation, Prerogative in favor of the injured individual was allowed to issue against the forfeited property of the Criminal: conditioned however, that it should be reprocured with, as not to prevent the infliction of the sentence of the Law, upon the offenders person. Stro 873 Ld Ray 1572

"Whenever the crime does not cause a forfeiture of both the person and property of the offender there in all cases cl. G. supposes the civil injury may be redressed by action. Tidd.

In Great the doctrine of merger seems never to have been regarded. An action has been sustained to redress the private wrong included in the crime of Arson & in the crime of Perjury; & in this state where either the person or property of the criminal is lost free from the claim of the Public, it is liable to redress the injury of the individual: No crimes here work a forfeiture of Estate but Manslaughter, which subjects to a forfeiture of Goods & Chattels: And the burning or destroying in time of peace any Magazine of public provisions, military or Naval Stores, or any public Vessel, or Ship of War; which subjects the offender to a forfeiture of the whole of his Estate. Stat. Gen. 1822 c. 288.

Of the rights of Punishment.

The right of punishing crimes, is founded on the Law of nature. This Law is revealed to man partially in the holy Scriptures: And to know this Law we must depend principally on the great volume of nature, & nature which is unfolded to all, and the genuineness of which none can doubt. This Law of Nature, constituted of the revealed and unrevealed Law of God, as it gives a right of punishing for crimes, must in a state of Nature have vested every individual with the right of punishment: For in a state of Nature all men being equal this right of Punishment or Penal Sanction of the Law, unless in every man, could be vested nowhere. To deny therefore that by the Law of Nature, every man in a state of Nature, who had it in his power might punish an offender against that Law, is denying the very existence of that sanction, and amounts to a virtual declaration that Destiny the sensible that man needed Laws for his government & protection, yet lacked wisdom to attach to those Laws, which he had enacted for this purpose, any efficacious principle or binding force. For the Law of Nature or any other penal Law, without a penal sanction is neither efficacious nor obligatory. 4 Bb. 7.

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In a state of society the right of punishment is vested in the supreme head of the Community & is said by some to be founded on the social compact, that is an express or implied assent of the members of the Community to submit to the laws and punishments enacted & inflicted by that Community. 2^d 8.

This ground is sufficiently broad to authorise all punishments for offences mala in se, or against the Law of Nature: because as individuals in a state of Nature had a right to punish such offences, they could, when society was formed, delegate that right.

But on this principle, mere positive offences, offences mala prohibita only, cannot be punished: because individuals when they formed themselves into society proposed no right to punish such offences for they could not then exist as they arise only out of society: and not having the power themselves, they clearly could not invest the Community with it: for none can give more than he possesses.

But the true principle which authorises such punishments for the right is not denied, is Necessity. Necessity is that of force which law in its application to natural & artificial persons is varied as the several subjects of that Law are varied: it is not necessary that a natural person, one in a state of nature, should propose the right to punish offences merely of prohibition: because to him they do not exist. But for society which is a more artificial person it may be necessary to punish acts which are not offences against the Law of Nature, but injurious to the society only and to the extent of this necessity society has a right to forbid & punish commission of such acts. 1st 2^d 3^d 4th 5th 6th 7th 8th 9th 10th.

The end of all human punishments is the prevention of Crimes. This is to be attained either by removing the offender by the infliction of perpetual punishments not affecting life, by temporary imprisonment—
fine

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fine or exile, by depriving him of the power to commit any offence in future, is by popular imprisonment, but most effectually by depriving the offender of life: and by deterring others by the dread of his example from committing like offences and for this purpose are infamous, ignominious & public punishments: but all punishments are more or less calculated to produce this effect. 7 Bb. 11. 12

Persons incapable of committing crimes

It is regularly true that all persons in society are liable to be punished for disobedience to the law except such as are expressly exempted therefrom. 4. Bb. 20.

All the excuses which protect the committer from the punishment annexed to the commission of the forbidden act may be reduced to this single point Want of Volition: for to constitute a crime there must always concur an intent to do an unlawful act, together with an actual commission of the act forbidden. Do 20?

When a forbidden act is committed then the only question is whether the will accompanied the commission of the act.

This want of a will obtains in three classes of cases viz 1st When there is a want of understanding - 2nd ^{when} though there be no mental incapacity, the understanding is not called into operation and 3rd When the act is committed by compulsion.

First. of a Want of Understanding, which implies a defect or want of Volition. Infants under the age of discretion come under this class: these are regularly punishable for no act being presumed to be deli ungraces. 1 Hec. 1. 2. 4 Bb 26-1.

When the offence consists in an act of Commission, Infants are not generally punishable though of the age of discretion & the reason assigned is, that they have not the control of their property and are, not

not in jure - but under the control of Parents or Guardians: But where it is an act of Commission the law is otherwise. 1 Hale, 20-2 - 4 B. & C. 22-1

The age of discretion is settled at 14. Under that the presumption is against the Infants discretion: Under the age of 7, he is not liable to be punished for any crime: for under that age the presumption of his want of discretion cannot be rebutted. But the age of 7 or included at any age an Infant is liable civiliter for his trespasses: between the ages of seven & fourteen the infant is presumed to be de facto incapax and is therefore not punishable unless the Public prove his discretion: that pro the maxim ut malitia suppleat etatem applies. 1 Hale, 2. Fort. G. L. 12. 4056. 23.

It has lately been decided in King v. Burdett, that the presumption of the mental incapacity of an Infant cannot be rebutted till he is fourteen except in Capital Trials. Stargis doubts the correctness of this decision.

The rule that an Infant under the age of seven, is incapable of a crime, is applied by Writers on the subject, only to felonies. But W. G. supposes its extent to be all offences.

It has been laid down in some books that between the ages of ten & half of fourteen the Infant is presumed to be de facto incapax, that the presumption is against his discretion only from the age of seven & half and half. This distinction is not well taken: the Law is laid down correctly in the preceding rules. -

Idiots and Lunatics also fall within the description of this Class, and are punishable for its acts committed while under the operation of their respective incapacities. An Idiot therefore is never punishable for he is one who is incapax never to be associated with reason. But a Lunatic in a lucid interval may commit a crime. & for this, in a lucid interval he may be tried and punished. 1 Hale 11. 63. 60 43. 1 Hale, 2. 3 Inst. 6. 1 Hale, 30.

If the Commission of a crime become insane before arraignment he cannot be arraigned: if after arraignment & before Trial, he can-
can

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cannot be tried, if after trial & conviction but before judgment, sentence shall not be pronounced against him: And if after judgment but before Execution he shall not be executed. 1 Har. 2. 3 Inst. 4. 6. 1 Hale - 10. 34. 370. 4 Bl. 25. 395.

If the criminal's insanity be not obviously certain, the fact must be tried by a jury of his peers. 4 Bl. 25.

Although a madman is not himself liable for any act; yet one who voluntarily invites him to the commission of a forbidden act is himself guilty of the crime: as immediate agent or Committer of the act: the madman's being considered merely an instrument with which the crime was perpetrated. 1 Har. 3 1 Hale 67 - 619. 3 Inst 53.

There is an exception to the rule that the want of understanding will excuse the committer of a forbidden ^{act} from punishment. This is when one commits a crime in a voluntary fit of intoxication: this in the books, instead of being an excuse, is said to be an aggravation of the offence. Co. Litt. 247 A. 1 Har. 3 1 Hale 32. Plow. 12 A. 46. 125.

It is presumed however that a mental debility, caused by a long course of habitual intoxication, would form as good an excuse as a want of understanding, arising from any other source whatever.

Secondly, where the defect of Volition arises not from the want of ordinary mental powers: but because the understanding is not brought into operation, or in other words does not accompany the commission of the forbidden act. This happens when the act is committed by misfortune or Chance. 1 Har. 5. 1 Inst 123. 46 124. 1 Hale 39.

Excuses on this ground are confined to cases where the party was in the commission of a happier act, i.e. if the act intended to have been committed were unlawful, the excuse is taken

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taken away: But the degree of Guilt is still to be measured, by the magnitude of the offence intended to have been committed. if the act intended would have amounted to Felony; & homicide by chance, it is murder: if to a trespass only, and the person in the commission of it should accidentally kill another it would be manslaughter. 1. Kel. 39. 4 Bl. 27.

Ignorance or Mistake in point of fact - is also a good excuse under this head. But a mistake in point of Law is no excuse: no man being allowed to shelter himself from punishment under an agreement that he is ignorant of the Law. Co. Lo. 538. Ro. 343. 1 Ray. 467. &c. 1 Inst. 81. 1 Burr 31. 1 Hawk 23-110. 1 Hale 2423. 1 Ke. 314. 4 Bl. 27..

Phrensy. if a defect of Will arising from Compulsion. Where one is compelled to do an act, the idea that his Will accompanied the commission is necessarily excluded: so where one in obedience to the municipal Law does an act in direct opposition to the Law of Nature he is excused on the ground of Compulsion. 4 Bl. 28. -

Under this head a Female Court is in many instances excused, who commits a forbidden act in the company & by the coercion of her husband, and if she commit the act in the presence of her husband it is presumptive evidence that she did it by his coercion. And this is the true ground why a woman who commits theft or burglary in the company of her husband is excused, and not as asserted by some writers that she cannot tell but the property is her husband's. 1 Hale 45-7. - Kel. 31. 10 Mod. 63. 1 Co. 71. 1 Burr. 294.

But it is not universally true that the coercion of the husband will excuse the wife. In Treason Murder & Robbery it forms no excuse for her, her guilt is as unextenuated as if she were sole; though as to Robbery it has been questioned. 1 Hale 47. 1 Burr 294. 1 Hawk 2-4. 7 Bl. 29.

It is also stated in a note contained in a late Edition of Blackstone that

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that the husband's consent does not excuse in the commission of Adultery. 1 & 21.

In no other Civil or domestic relation or subject is excuse a principle of excuse. If a son commit a theft by the command and coercion of his father, or a servant of his master: either is liable.

1 Hale-44. 3 Bul-54. Nov. 113. - 818. 1 Hale-5.

Another species of Compulsion which will excuse the commission of a forbidden act is Duress - fear, threats, or menaces, which induce a rational and well grounded fear of loss of Life: or of other great bodily harm. 4 Bul-50. 1 Hale-50. 1 Hale-5.

This excuse generally applies as to positive crimes only and not to those which are mala in se: In this principle a man may be justified in doing many things in time of War to save his own life, which but for the compassion occasioned by the strong desire of self preservation which is implanted in every breast, would amount to Treason - Treason being sometimes more positive offences. But no one has a right to kill an innocent person to save his own life. 1 Hale-51. 4 Bul-30.

Legal Compulsion will also under this head not only excuse but justify the commission of an act, ^{which} would otherwise be punishable, as where an officer is bound to arrest a felon to effects which he is under the necessity of either killing or wounding him. Or to disperse a riot in doing which he necessarily kills or wounds a rioter. 1 Hale-53.

It has been a most point, among the writers on the Law of Nature whether a person is under extreme want, could be excused in stealing. On principles of Natural Law the State it must be conceived would be without sin: But at present Law & in time such provisions are made to relieve & prevent want that no excuse for theft arising from hunger, thirst or nakedness would

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could be admitted. 1 Hal. 59. 4 Bl. 31.

Principals and Accessories.

In the commission of crimes persons may be guilty in different degrees which gives the division of offenders into principals & accessories. Some of principals some are of the first and some are of the second degree: a principal of the first degree is one who is the actual perpetrator of the crime. A principal of the second degree is one who is present aiding & abetting in the commission of the crime, but who is not the actual perpetrator. Hawkins admits no distinction but makes them principals in the last degree in both cases: the distinction however seems rational and is supported by the books. 1 Bl. 34. Hale. 615. 2 Hal. 77. 2 Hawk. 91. 258-326.

The presence necessary to make a principal in the second degree need not be an actual presence, a constructive presence is sufficient, as if one be at a distance & help forward while the principal in the first degree actually perpetrates the crime. 1 Hal. 35. 4 Bl. 37.

And from the nature of some crimes and the manner of commission, no presence, not even a constructive one is necessary to make one a principal in the first degree. As if one lay poison, set a trap, dig a pit, or let loose a ferocious animal to harm another, he is guilty, & is principal in the first degree of the crime done. Kel. 52. 1st. 62. 591. 4 Bl. 44. 96-81. 2 Hal. 743. 3 Inst. 123. 1 Hale. 617.

An accessory is one who is not the chief actor in the commission of a crime, nor either actually or constructively present at its perpetration but who is in some way concerned in it either before or after its commission. 4 Bl. 35.

In High Treason there can be no accessory because of the enormity of the crime. 3 Inst. 138. 12 Co. 21-2. 1 Hal. 613. 2 Hal. 437. 470. 1st. 57.

It is a general rule that whoever gives aid or assistance

accessory in Felony: will make him in treason a principal. This rule has formerly questioned as it applies to those who in Felony would be accessories after the fact: but it is now settled that there is no distinction. 1 How. 58. 2 S. 439. 12 C. 81. Lym. 296.

In petty Treason, Murder and all other felonies there may be accessories: but in those felonies where in presumption of Law the crime is unpardonable there can be none before though there may be after the fact: as in Involuntary Manslaughter. 1 How. 115. 1 Hale 615. 2 How 441. Pe. 132. 4 C. 36. 191.

In petty Larceny and all the minor offences there can be no accessories: for the Law will not endeavour to distinguish between the different shares of guilt of the persons concerned in these petty offences, but considers them all as principals. 1 How. 116. 615. 2 How. 439. 40 C. 51. 51. 12 C. 666. 1 S. 312. 6 C. 66. 750. 12 C. 51.

From the above description of an accessory it appears that his guilt is altogether of a derivative nature being wholly determined by that of his principal. Hence the general rule that an accessory cannot be guilty of a higher offence than his principal. Therefore if a servant be accessory to the crime of killing his master by a stranger or Wife of her husband they are guilty only as accessories. to the murder. *Accessarius sequitur naturam suiprincipalis* is the Legal maxim which governs this subject. 1 S. 312. 12 C. 332. 12 C. 41. 1 How. 132. 3. 445.

Accessories are of two kinds. accessories before the fact & accessories after the fact. an accessory before the fact is one who procures, counsels or commands another to commit the felony, he being absent at the time of commission, for if he has been present he would be a principal in the second degree. 1 Hale 615. 616. 2 How. 445. 12 C. 445.

If the person procuring counselling commanding &c. contracts his counsel & countermands the commission of the act, he is not accessory.

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though the crime is otherwise actually committed. 2 How 475. Foster 354.
Hale 124-537. See 475 & 354-51.

It is a general rule that he who abets another to commit an unlawful act is accessory to all that directly and naturally ensues from the commission of that act. But where the act abetted, is the commission of the unlawful act, commits a distinct crime which is no direct or natural consequence of that which he has counselled to commit, the counsellor is not accessory to the crime. For instance if A command B to beat C, & he beats him so that he die A becomes accessory to the murder. But if the command had been to burn the house of C: and B had not only burned the house of C but had also robbed him. A would have been accessory to the burning only. Yet if the burning had caused the death of C. as that would have been a direct and natural consequence of the commission of the crime commanded. A would have been accessory both to the burning & to the murder. 1 Hale 617. Foster 340. 341. How 475.

Where one counsels another to commit a crime in a particular manner and it is done in a different manner he is nevertheless accessory to the crime committed. As if A commands B to shoot C, and C is killed him by poison. 2 How 446-7. Hale 617. Foster 340. How 470-6.

The mere concealment of an intended felony does not make one accessory thereto: Such concealment however amounts to Misprision of Felony a Misdemeanor nearly bordering on Felony itself. 2 How 447. Moore 8. 3 Sm 139.
4 Bl 119. 1 Hale 424.

Persons who are accidentally present at the commission of a Felony and do not attempt to prevent it, nor to arrest the felon after the commission of the act: though not accessories, are guilty of a high Misdemeanor. This rule does not extend to Infants thus being excused where the offence consists of corruption only. 2 How 442-115. 116. Key 50.

An accessory after the fact is one who receives, relieves comforts or assists

assist a felon knowing him to be such. but the assistance given to the felon must have been with an intent to prevent his being brought to public justice. 4 Bl. 37. 1 Hale. 618. 2 Hawk. 214. S. 448. 182. Cic. 888. 1 Holt. 68.

At Common Law buying or receiving from a felon stolen goods, knowing them to be such, did not make one an accessory to the theft, but guilty of a high misdemeanor. Now by Stat. 5. Geo. 4. c. 64. such person is made accessory. 1 Hale. 620. 4 Bl. 33. Cic. 888. 1 Holt. 68. Allyn. 57.

By the 4 Geo. 4. c. 64. "theft" such receiver is made a principal & as such punishable, unless the goods be by one of his own family. 22. 184.

To make one accessory after the fact, the felony must be complete before the assistance given. 1 Hale. 209. 10. 622. 2 Hawk. 457.

If a Female assist or receive her husband knowing him to have committed a felony it does not make her an accessory: she being excused from all punishment on the presumption that she acted by his coercion & that her Will of course did not accompany the act: but this rule will not hold a converse nor in any other domestic relation. 1 Hawk. 4. 2. 451. 1 Hale. 621. 3 Inst. 118.

It is a general rule of Com. Law that Accessories are liable to the same punishment as their principals: but by Stat. in all cases of Accessories after the fact, Benefit of Clergy, is allowed. 4 Bl. 39. 3 Inst. 108. 188.

It was formerly held that an accessory could not be arraigned or made to answer till his principal was attainted. 9 Cr. 17. A. 114.

But it is now settled that he may be arraigned & is punishable in answer though he cannot be tried but by his own consent, before his principal is attainted. 4 Bl. 32. 40.

But principal & accessory may be tried at the same time, when however the Jury must find the principal guilty, before they can decide on the guilt of the accessory & so should the Judge inform the Jury in his

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his charge. 2 How. 453. 1st 4 Bl. 46. 323. id. 324.

In England by the Statute 1 Ann., the accessory in certain specified cases where it is impossible the principal should be tried may himself notwithstanding be subjected to trial. 2 How. 453. 5-6. 4 Bl. 40. id. 323. 4.

If the principal is acquitted the accessory cannot be prosecuted. but if a prosecution have commenced no prosequi must be entered. 1 How. 23. 4. 4 Co. 43. 2 How. 452. 3.

If the principal and Accessory have both been attainted, and the attainder of the principal is reversed by Writ of Error it ipso facto reverses that of the Accessory. 2 How. 452. 3. 96. 114. 1 Hbl. 777.

But the accessory may be prosecuted, attainted & executed notwithstanding the attainder of his principal is manifestly erroneous on the face of it if it have not been reversed, for such attainder is not void but only voidable and that, but by Writ of Error. 2 How. 452.

But the death or pardon of the principal after attainder does not even at Com. Law avail the accessory. 6 Co. Obs. 541. ^{in 41} 1 Ray 477. Ayer 120. 2 How. 453.

But the death or pardon of the principal before the attainder would at Com. Law discharge the accessory: even though it were after conviction of the principal. because complete evidence of his guilt, does not exist till the attainder. But the law is now by Stat. 1 Ann. varied in this respect. id. 453. 4 Bl. 423. 1 Hbl.

If one be acquitted as accessory before or after the fact: he may afterwards be indicted & tried as principal. And so if one be acquitted as principal it is clear he may afterwards be indicted ^{as} as accessory and tried: after the fact. But it seems to be doubted whether he can be indicted as accessory before the fact, but without reason. It would surprise, for I think that no solid objection is in the way of

his prosecution as accessory follows the fact. Hein. 625. 6. Inst. 62. 361. 2 Nov. - 329-36. & 56-46.

The indictment ag^t an accessory need not state that the principal committed the offence: it is sufficient that his commission be stated, this being considered *adversum ipsum* supposes *prima facie* evidence of his guilt. - 2 J.R. 468.

Yet the accessory on his trial may controvert his principals guilt; the conviction is *adversum ipsum*: Conviction then is only *presumptive*. Evidence of the principal's guilt and places the *onus probandi* on the accessory to show that the principal is not guilty. 2 Nov. 456.

But whether where the principal has been attainted the accessory can controvert his guilt is not settled: on the ground that the attaint is *full evidence* of his guilt it would seem he could not.

But on the ground that a record of a trial is not *admissible* evidence. But between the parties to that record it would seem that he might controvert his principals guilt. An accessory is neither party nor bring to the record of his principals guilt, Crimes having no parties as this being in this nature distinct.

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Felony --- is any offence which at Common Law occasions a Forfeiture of Goods or of Lands, or of both.

Felony is therefore a general term, designating not a particular crime only but a whole genus of offences. 4 Bl- 94.5.

The Word Felony did not originally denote any crime but merely the consequence of an offence. Felony signifying the forfeiture of a Feud or fee: by an easy mutation of Language it soon became the usage to apply the term not to this forfeiture, which was a consequence of the crime, but to the crime itself, which caused the forfeiture. By a still further deflection from the original import of this word it was made to designate not only such crimes as caused a forfeiture of a Feud, that is of Lands, but any crime which caused a Forfeiture whether of Lands or of Goods and Chattels. This by degrees bringing the word to that meaning which it now bears according to the above definition. 4 Bl- 95. 2a.

By the definition of Felony, Treason is included as it causes a forfeiture, and this crime was anciently denominated a Felony, but now by common Consent, it is classed as a distinct species of crime: For its atrocity standing by itself, when the Word Felony is now used, Treason is not considered as included. 1 Hal- 79. 3 Inst- 15.

Capital Punishment not being of the original offence, is not the necessary consequence of Felony. Yet it is generally superadded, tho' to self murder, excusable homicide & Petit Larceny all of which in strictness are felonies, Capital Punishment was never at Common Law annexed. So tho' the crimes of Heresy & standing mute were punishable with death though they are not felonies. 1 Hal- 114. 146. 3 Inst- 43. 2 Bac- 446.

It is a general rule that all felonies which are punished

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capitally work a total forfeiture of both Lands and Goods and those which are not Capital of Goods & Chattels only. 4 Bl. 381-77. C. Litt. 391.

The signification of Felony was not formerly the same as Capital Crime; but now according to Common Usage Felony as a generic term includes all capital crimes below treason. 4 Bl. 97.

And according to this modern usage is the term now construed when found in a Statute: hence if a Stat. declare in general terms that the commission of a certain act is felony, commits both in England & Scotland would sentence the offender to death, & his whole estate in Eng^d would be forfeited of course. So if a Stat. annex the punishment of death to the commission of an act - the commission of that act would of course be deemed felony and forfeiture of Goods & Lands would ensue. C. Litt. 391. 1 Hal. 627-641. 703. 1 Hal. 273. 1 Hal. 168.

Still if a Stat. should punish an act under a forfeiture of all the offenders "Goods & Estate" or of all he has "the commission of the act" would amount to a misdemeanour only: For the words, "all his Goods & Estate" or "all he has" leave the intention of the Legislature doubtful; & when that is the case a construction most favorable to life must always be given. C. Litt. 391. 1 Hal. 627-641. 704. 4 Bl. 644.

All those offences which in Eng^d cause a forfeiture are called Felonies in Comm^{on}: though here no crimes cause a forfeiture, but Manslaughter, which works a forfeiture of Goods & Chattels only: or burning or destroying in time of peace public Magazines or vessels which works a total forfeiture of all the offenders Estate. —

Benefit of Clergy.

Clergyable offences are those in which the benefit of Clergy is allowed the offender.

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The benefit of clergy arose from the superstition of ancient times and the reverence that was paid to the Holy See. The pope taking advantage of the folly and ignorance of mankind usurped for his clergy the privilege of committing crimes without a liability to punishment. This privilege exempted the offender after conviction of a crime from death, with which he would otherwise be punished. 4 Bb. 313. 363. 373. 2 Haw. 236.

But this benefit does not protect the offender from a forfeiture of his goods & chattels, they being vested in the crown by his conviction: and having obtained a legal title; Wagstaff is not to be ousted, even by the pious sons of the Gospel. 4 Bb. 387.

Benefit of clergy is a species of pardon it is granted after conviction and does not prevent a forfeiture of goods and chattels: in both of these respects it is similar to other pardons.

This benefit was allowed at Com. Law in most cases of Capital Offences. High Treason, however, was never eligible & Trotter has also been said by some never to have been eligible at Com. Law: Petit Larceny & all the minor offences were never allowed this benefit: 4 Bb. 366. " 377. 2 Haw. 477.

And originally when this benefit was indulged it was not legalised till the statute, 25 of Edward 3, when it received a parliamentary sanction in its application to most capital offences.

By this statute, too it was extended to Petit Treason. 2 Haw. 477. 4 Bb. 374.

Originally this benefit was only allowed to clerks in orders: next it was extended to all who could read: the art of writing being considered as a necessary accompaniment: and as it was allowed to those who read in the temple that they were supposed to be clerks in orders thereby, it was at of course at Com. Law ever extended to gentlemen & scholars—

relating

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rebutting the otherwise irrefragable evidence of Clerkship which arises from reading. 2 How 14 s. 2 Hale 372. 4 Bl-369. 4 Bl-462. "362.

Now however by several different Statutes this benefit is extended to Clergyable offences within the Stat 25 Edw 3 to all offenders, whether male or female, or whether they can read or not. 4 Bl-462 "362.

Still however Lay persons are not wholly excused from punishment but as a sort of Commutation for life; they are subjected to some inferior punishment as transportation, whipping, burning in the hand, imprisonment, or the like: but Clergymen, Purses, Peers, or the allowance of this benefit, are wholly excused. 4 Bl-362. "373-4.

Clergy are entitled to this benefit as often as they commit Clergyable offences: Lay persons but once in their lives. 2 Hal. 373.

By the allowance of this benefit of Clergy for any particular offence the offender is excused not only for the commission of that, but of all others antecedently committed, (4 Bl. 374) Clergyable offences.

The allowance of Clergy has now become so general that it is an appendage of all felonies, whether of born Law origin, or created by Statute: unless it be expressly taken away by act of Parliament. Of course all new felonies are Clergyable unless the Statute that creates them, or some subsequent one, expressly take the benefit away. 2 Hal. 330.

It was formerly the custom to plead this benefit in Bar, and it was called a declinatory plea. But it is now customary to claim it after conviction by way of arresting judgement; and this is the better way, because an acquittal may result from trial and Clergy be saved as a shield from punishment on some future conviction. 2 Hale-236-4 Bl-359.

This Clerical Privilege or Holy Shield for iniquity is unknown in Connecticut.

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Homicide.

Homicide is the killing of any human creature; whoever kills another commits homicide.

Homicide however is not necessarily criminal it being of three kinds. 1st Justifiable 2^d Excusable and 3^d Felonious. 1 Haw. 100-4 - 110. 111. 115. 3 Bac 661 - 4 Bl. 177.

Justifiable Homicide as might be inferred from its denomination is wholly free from guilt. Excusable is slightly tinged with guilt, & the offender is subjected to a nominal punishment. But Felonious Homicide is the greatest of all offences against the law of nature, & by the municipal Law is considered inferior to none but Treason. 1 Haw. 283. 1 Mac-101-2-9. 1 Ma-539. 4 Bl. 177-188.

Justifiable Homicide.

First, Homicide is justifiable when occasioned by some unavoidable necessity. As if one pursuant to a judicial sentence of death, execute the convict. 1 Haw. 105. 4 Bl. 178.

But the Law must require the act to be done that occasions homicide; and it must be done by the person required by the Law to do the act, or by his appointed Deputy, or it will be felonious homicide: because legal or unavoidable necessity did not require the commission. 4 Bl. 178. 3 Bac-674. 1 Haw-106. 1 Hal-561. 2 497. Finch L-31.

The officer who executes the criminal, must pursue the very terms of the sentence; a deviation would make him guilty of murder. For if he inflict any other punishment than that directed by the sentence or inflicts it in any other way, he acts without authority and the execution is not servato ordine juris. 3 Bac-674. 6 Litt-128. 1 Hale-501. Finch L-31. 1 Haw-116.

The sentence in pursuance of which homicide is committed must be passed by a Court of competent jurisdiction in order to constitute a justification for the officer who executes it: for the vice not only lies

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but the Court also are guilty of Murder: the whole proceedings in such case being Coram non Judice.

If the Court have Cognisance of the offence & pass sentence of death on the offender where that is not the punishment by Law annexed to it the Judge will be guilty of murder on the offenders execution: but the officer will be justified: because the proceedings in this case being Coram-Judice therefore only avoidable, the officer is saved in acting under them. 11 H. 7. 6. 1. 11 H. 7. 103. 6. 3. Bac. 674. 5 C. 106. 7. 18 H. 7. 497. 500. 4 B. 6. 494. 178.

Second ^{ly} Homicide is justifiable in certain cases when committed for the advancement of Public Justice. As if an officer in attempting to arrest a felon is necessitated to kill him, because of his resistance or endeavour to escape, or in attempting to suppress a riot is under the necessity of killing some one of them, that he may disperse the rest.

This last rule is said to apply to private persons who to conserve the peace may justifiably commit homicide where the riot cannot otherwise be suppressed. 1 H. 7. 106. 7. 109. 2 C. 106. 6. 8. 18 H. 7. 494.

If an actual felon resist or fly from his pursuers they may if it be necessary to his apprehension justifiably kill him: but if he be only suspected of a felony the Law is otherwise. 1 H. 7. 106.

As if an innocent person is indicted for a Felony and an officer who has a legal warrant to arrest him is absolutely obliged to kill him to effect the arrest he will be justified. 1 Hall. 189. Inst. 276. 3 Inst. 56. 18 H. 7. 109.

Third ^{ly} Homicide is justifiable when committed to prevent any felony & atrocious crime. To prevent a robbery or burglary homicide would be justifiable: but to prevent a crime not accompanied by force would not be justifiable: As to prevent Larceny or the picking of ones pocket: 1 H. 7. 108. 9. H. 128. 9. Inst. 271. 5. 1 Hall. 486. 7. 493. 494.

So though the killing is to prevent the commission of a felony yet it is not justifiable unless it would have amounted to felony or an

atrocious

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atrocious Crime: as if one should kill another to prevent his entering into a house in the day time it would not be justifiable unless there was an intent also to commit a robbery or some other atrocious crime. --

1 How - 108-9. 4 Id. 128-9. 1st. 271-5. 1 Hale - 486 - 7-493 - 494.

Homicide is not justifiable when committed in defence of one's house goods or person from a bare trespass: such homicide - however may be excusable. And if something more than a bare trespass is intended it may be justifiable. 1st. 273. --

Co. Ch. 538. 1 How - 108-4. 1 Hale - 485 1st

Where the merely trespassing act is to one's property & homicide is committed, it is at least manslaughter: as if an officer in attempting to break a debtor's windows for the purpose of arresting him and is killed by the debtor it would be manslaughter. 1 How - 108. 113. 4 Bl. - 184 - 5. --

It is a general principle that where a Crime in itself Capital is attempted with force, that force may be lawfully repelled by the death of the party attempting such crime. 1st. 181.

It does not seem that the justification of homicide is confined to those cases only where the crime intended is Capital: but to what other cases it extends is not well defined in the

books. - But a female to preserve her chastity - a husband that of his wife - or a parent that of his daughter, may kill another; & who can doubt but a stranger to prevent the horrible & atrocious crime of Rape would be justifiable in committing homicide. --

1 How - 105 - 7 Bl. - 188.

According to the old opinions found in the books, a justification of homicide may be pleaded in Bar. But the late opinions are that it must be given in evidence under the general issue.

The ancient opinions however seem best founded in reason and are

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are analagous to the rule respecting justifications in Civil Actions.
1 Hall - 115. 1 Hale - 478.

But a mere excuse must be given, it has always been agreed, in evidence under the general issue: and not specially pleaded - because an excuse does not amount to a justification. 1 Hall - 115.

Excusable Homicide

Excusable Homicide is not strictly lawful: it is however so slightly faulty, that the slayer is excused with only a nominal punishment. 4 Bb. 182. Of Excusable homicide there are two kinds - 1st Homicide per Infortunium or by misadventure: and 2nd Homicide se defendendo or self defence: the first kind is involuntary: the second is voluntary. but committed from such motives and under such circumstances as in Law constitute an excuse. 1 Hall. 111. 1 Hale - 31st 393. 492.

Homicide per Infortunium: happens where one involuntarily kills another. As where the head of an axe, with which one was at work flew off and killed a by stander: The slayer under this head must be pursuing a lawful act without intention of harm, or the homicide will not be excusable. For instance if one in riding has his horse wantonly whipped by another, so that he runs with the rider & kill a third person the rider will be excused, but he who whipped the horse is guilty of Manslaughter. 1 Hall - 111. Inst. 258. 9. 1 Hale. 472.

If a parent in moderately correcting his child; a master his servant; a quarrelsome his ward; a jailer his prisoner; or an Officer his Criminal - accidentally kill him it is excusable homicide only: But if the correction had been unreasonable or outrageous it would have been Manslaughter at least; and if a dam-

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Weapon had been used, Murder. Fel. - 65. Mans. - 11. Post. - 262. 5. M. - 287.
 Skin - 668. 456-482.

If death accidentally ensue upon the commission of an unlawful act, it is felonious: if the unlawful act were but a trespass, it would be manslaughter, but if it amounted to felony then the accidental homicide is Murder. 3. Bac. - 676-7. Mans. - 112-13-126-7-8. 5. M. - 287.8
 2. Fel. - 117. Sub. - 134. Pen. - 499.

Though the unlawful act be but a mere trespass, yet if it were committed in pursuance of a deliberate & malicious intention to do another a personal injury & death accidentally ensue, it is murder. Fel. - 117. Mans. - 112. 18. Ab. - 39. 478.

If homicide accidentally ensue upon the commission of an unlawful act, which has a natural tendency to bloodshed, it is murder. Mans. 112. 456-193.

If one do an Idle act, manifestly endangering another's life, and death ensue it is manslaughter, but if it were in consequence of any lawful sport as foot ball or wrestling it would be excusable homicide. Strange - 481. Post. - 260-261. Mans. - 112-121. Post. - 260-1.

Homicide se defendendo.

This happens where one in a sudden affray kills his assailant in his own defence: This species of homicide is distinct from justifiable homicide to prevent a capital crime: there the right of killing is the right of the public; & is therefore sufficient to justify: but here it is merely a privilege of the individual, and will only serve as an excuse. 4. Ab. 193.

It is correctly said in Bacon that it is immaterial which of the two combatants gives the first blow: provided he who kills the other is actually obliged to do it in self defence. 3. Bac. - 677.

But to excuse homicide in self defence it must appear to have been —

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been done when there was no other possible or at least possible means of saving the slayer's own life: or escaping without great bodily harm. 1 How - 108 - 113. Kel - 128. Inst - 273. 4 Ob - 184.

It seems indeed, when homicide is committed to save one's own life, that it is nearly of the justifiable homicide, committed to prevent the perpetration of a capital crime & on the ground of this resemblance, it being in fact to prevent a capital crime, it might on principle be considered justifiable, were it not that the necessity, necessitas culpabilis, as it is expressed by Bacon, of killing, in presumption of Law arises in some measure, from the slayer's own fault. 4 Ob - 183-7.

It is a general rule that if both parties are fighting, that is, striving for victory, when the mortal blow is given, the slayer is guilty of manslaughter: But if one of the parties have not begun to fight, or having begun declines the combat, and then in extreme necessity kills the other & saves his life or to escape from great bodily harm it is excusable homicide. Inst - 277 - 3 Inst - 56. Hale - 481. 4 Ob - 184.

According to some opinions the aggressor himself, or he that provokes the combat, or the other to the assault, is excusable in committing homicide sedependendo he having first fled from the combat, and being urged by extreme necessity at the time. The current, however, especially a later opinion, is the other way. Hale 479-480-2. Kel - 58. Inst 276. 1 How - 113.

And the later and better opinions go still further & say, that if one who is the aggressor, strike another with malice, propre & designing himself to win or his opponent, flee from him, & on a then in extreme necessity kill him in self defence, it is Murder. 1 How - 113 - 122. Kel - 58-129

If two persons agree before hand to fight a duel and one of them to preserve his own life kill the other, he is guilty of murder: because in the previous engagement to fight express malice is shown. Hale - 475-477. 1 How - 112 - 122 - 125 - 126. Kel - 117.

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Is the second of one who kills another in a duel is guilty of murder, as principal in the second degree; and according to some opinions the second of him who is killed is also guilty of murder. But the better opinion is the other way, and the reason assigned is, that he could have no malice against the party slain. 1 Haw. 125. 1 Hale - 445. - 1 Green - 514. 4 Bb 199.

The excuse of self defence extends to the civil & natural relations of the principal. A Wife therefore who kills another in defence of her husband is excusable; A husband in defence of his Wife; A parent of his child; or a child of parents; A master of his servant or a servant in defence of his master: are all excusable in committing homicide. 1 Hale - 434. 3 Bac. 675.

As a stranger may commit homicide even justifiably, to prevent felony, or other forcible and atrocious crime, the above rule confers no privilege on the relations of the principal unless it mean that they will be excused in committing homicide to prevent a great bodily harm to their relation, where a stranger would not.

The excuse of self defence or whatever matter that will render the killing, for which one is indicted, excusable, must be given in evidence under the general issue: because that which excuses does not justify, and will not support a plea in Barr. Fitz St. N.B. - 246. 1 Haw 105-115.

Both kinds of excusable homicide are said by books to have been anciently punished with death: later Writers, probably on good grounds, deny the assertion. 2 Sm. 145. 3 B. 282. 1 Haw. 114. 1 Hale - 425. 4 Bb. 188.

The punishment then of Excusable Homicide seems anciently to have been a partial or total forfeiture of Goods & Chattels: & it was therefore called a Felony: though for a long time it has not been so classed; it not being a Capital Crime. 4 Bb. 95-7. 1 Haw. 114-5. 2 Haw. 442.

As far back as the English Records extend, Excusable homicide has subjected the offender to a forfeiture: but for the same length of time he has been

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been entitled of course & of common right to a pardon and to a writ of restitution of his Goods. Indeed the Judge will now direct the jury to find a general verdict of acquittal. 1 How. 115. 3 Int. 283. 2 How. 338. 4 Bb. 188.

It is settled that there can be no Accessories to excusable homicide, as it is not now deemed a Felony. 2 How. 447. 1 Hal. 615. 616.

Felonious Homicide.

Felonious Homicide is the killing of any human creature without justification or excuse; it may be committed either by killing one's self or another person. 4 Bb. 188-9. 1 How. 102.

First By killing one's self. The crime of self murder as the term imports, arises from the commission of homicide by one upon himself, and such person is distinguished in the Law by the appellation of a Felo de Se.

A felon of this description therefore is one who deliberately puts an end to his own existence, or who commits an unlawful or malicious act whereby his own death ensues. 1 Hal. 113. 3 Int. 34.

If one request another to kill him, & in pursuance of that request the other does kill him it is murder in the homicide; but the person killed is not a Felo de se for his licence was void. 1 How. 113. 104.

To constitute a Felo de Se the suicide must have been of years of discretion, and Compos Mentis. 1 Hal. 411-2. 1 How. 102. 3 Int. 34.

This crime admits of accessories before the fact, but of none after the fact. Accessories to the crime of suicide are called Accessories to the crime of Murder; they might more properly be denominated Accessories to felonious homicide. 4 Bb. 189.

At Common Law the committer of self murder is punished; or rather the consequences of the crime are the subjection of the suicide's body, for it is not in strictness a subject of punishment, to an ignominious burial in the high ways to insipalment and

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and his Goods and Chattels are forfeited: but as he cannot be attain-
ted his Land are not forfeited: neither is the offence Capital. 1 Hawk. 113.
1 Hal. 405. 1 Plow. 241. 259. 262. 323. 1 Ray. 4. Finch L. 216.

In Connecticut the body of the suicide is not interred nor
ignominiously buried: his Goods and Chattels are not forfeited and
there is no probability, tho' the question has never been judicially settled,
that here the Com. Law consequence of this crime will ever be attached
to its commission.

Second? By killing another person. Felonious homicide by
killing another person, consists in taking the life of another person --
without justification or Excuse.

This kind of homicide is subdivided into such as is un-
attended with Malice when it is called Manslaughter, and such
as is accompanied with Malice which is called Murder. 1 Hawk. 113.
1 Bl. 190. 1 Hal. 466.

The word "Malice" which has become so important, signifies, in
legal acceptation, any unlawful or wicked motive, which may ac-
tuate the heart, and is not confined to a particular malignity,
conspiracies are individual. It is well defined by Judge Blackstone,
to be any evil design in general, the dictate of a wicked, depraved
& malignant heart. 4 Bl. 199.

It will now be proper to proceed to consider in their order those
two kinds of Felonious Homicide by killing another.

1. Manslaughter.

Manslaughter is the unlawful killing of another without malice
and may be either intentional or unintentional Voluntary or in-
voluntary. 1 Hal. 466. 4 Bl. 191.

As manslaughter is committed without malice, there can
be no

be no excuses before the fact though there may be after the fact. 1 Har. 113. 4 Bb. 191.

First— Voluntary Manslaughter. If upon a sudden affray, two persons fight, and one kills the other, it is Voluntary Manslaughter; so also if on a sudden quarrel the parties go out into a field and fight and one is killed it is Voluntary Manslaughter only: for the law in its benignity considers the whole transaction as one continuous act & passion. It however a sufficient length of time has intervened between the quarrel and the combat, for the passions to subside, the homicide will amount to Murder. 1 Har. 112. 3 St. 291. — Kel - 115 - 134 - 135. Leach. Cb. - 151 - 5. 2 M. Wally - 563 - 568 -.

If one attempts to separate two combatants, and is killed by one of them, it is Murder. provided the slayer knew that the intention of the deceased was to part them: abito, it is manslaughter only. 1 Har. 127 - 8. 3 St. 272. 5 Bb. 64. 67. 114 - 5.

If one greatly provoked, as by having his nose pulled, or by this great indignity offered, immediately kills the aggressor, it is Voluntary Manslaughter: for the slaying is a sudden voluntary act not a passion. But if a sufficient time elapse between the indignity offered and the killing, for the passions to subside, it is Murder. Kel - 135 - 6. 1 St. 471. Har. 125. 3 St. 292 - 5. 5 St.

And the aggressor is immediately killed upon such provocation, but in such a manner as showed an intention of taking away life, or of doing great bodily harm: it is Murder. 1 St. 454. 473 - 474. Kel. 127. 1 St. 126.

If a parent on a sudden provocation outrageously correct or beat his child, in such a manner that homicide ensues, it is Murder. The rule is the same as it respects quarrelers, Masters, Schoolmasters, & Teachers. 1 Har. 126. 6 Bb. 157. 3 St. 544. Kel. 127. 3 St. 272.

If a husband slays a man in bed with his wife or in the act of

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adultery with her & immediately kill him it is Homicide - manslaughter only, and that of the lowest degree. Kel-137. 1Hal-486. 1Gray-212. 456-191-2.

But bare Words, insulting Gestures, a breach of an engagement, any act of dishonesty or mean-ness, or a trespass on one's land, is never sufficient to reduce a sudden killing to manslaughter, unless it ensued upon a reasonably intended chastisement: then it would be voluntary manslaughter. 456-200. Kel-55. 60. 67. 130. 131. 1Haw-124-5. 1Est-316. 291.

It is laid down generally, in Trulyng that if A who is the friend of B, interfere in a sudden affray between B & C and kills the latter, it is Manslaught only. The rule is laid down in too broad terms, for the interfering in such a manner shows an intention to kill or to do other great bodily injury, it is clearly Murder. The rule however may be true in its application to many cases. Kel-136-61. 126-97. 1Est-315.

Manslaughter upon a sudden provocation differs from homicide se defensione, in this: ~~but~~ the latter is committed to preserve one's ~~own~~ life: the former to gratify passion & effect revenge. 456-184. 192.

Second. Involuntary Manslaughter. - This species of homicide as the term imports, is always unintentional & accidentally ensues upon the commission of some unlawful act. 1Coop-838. 1Est-253. 261. 456-192.

It differs from homicide per Infotunium. In this, involuntary manslaughter ensues upon the commission of an unlawful act. Homicide per infotunium upon the commission of an act that is lawful. 456-192. 1Haw-134. 3Haw-56. 1Haw-472. 1Est-261. 292.

So if an act in itself lawful is done in an unlawful manner

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manner, and death accidentally ensue it is manslaughter of this kind: As if one throw a piece of timber from a building into the street without giving notice, & kills a man, this in the country would be manslaughter. If that were done in a populous City where many people were in the habit of passing it would be murder if it occasioned death, & manslaughter the loud warning were given. But in the Country in such case it be excusable homicide per Infortunium. Strang. 481. Kely. 40. 144. 112. 146. 472. 473. 476. 486. 192.

If one accidentally kill another while engaged in any rash Tolle, or dangerous Sport, which is not strictly lawful he is guilty of Manslaughter. 1 Hal. 472. 146. 261. 292. 146. 134. Though Involuntary Manslaughter always ensues upon the commission of an unlawful act, yet it is not in all cases Manslaughter merely for the unlawful act intended amounts to a felony, or has a natural tendency to bloodshed it is murder. 1 Ha. 126. 146. 117. 146. 258. 292.

Manslaughter is a bailable Felony, therefore not punishable with death, but with burning in the hand and forfeiture of Goods & Chattels. 4 Bb. 387. 201. 192.

In Connecticut we have a Stat. that annexes to the commission of Voluntary Manslaughter, the punishment of a forfeiture of all the offenders Goods & Chattels, burning in the hand, whipping on the naked body & disability of ever after giving evidence or verdict in any Court in this State.

Involuntary Manslaughter has been decided not to be within our Stat. nor subject to the punishments annexed to the offence at Common Law it being considered a mere misdemeanor & punishable with fine & imprisonment only.

Pillie George

Murder

Murder is a felonious homicide of the highest & most atrocious crime. The term murder anciently applied to secret killing only: & for this crime the Wille, or if that were too poor, the whole hundred, where the murder was committed, provided they did not arrest the felon, were liable to Amercement. 4 Edw. 117. 8. 3 Inst. 47. Ful. 121. & Hale 747.

We have no logical definition of murder: but by Sir Edw. Coke it is described to be "Where a person of sound memory and discretion —" "unlawfully kills any reasonable creature in being & under the —" "kings peace with malice aforethought either express or implied." 3 Inst. 47. Blas 118. & 186 195.

However correct and comprehensive this description may have been considered yet it certainly carries with it an Excess of Words and includes several superfluous Ideas; these will be shown in the analytical examination which will be given to this description, before the subject of Murder is dismissed. —

The following is presumed to be a correct and precise definition of Murder. "Murder is the unlawful killing of a reasonable creature with malice aforethought either express or implied."

But as Sir Edward Cokes description of this crime has been generally adopted, it may, to attain an accurate & thorough knowledge of the subject, be expedient distinctly to examine all its several branches, in their successive order. — Therefore,

First — "Where a person of sound memory and discretion" This branch of the definition is strictly true: it is altogether superfluous; for on general principles of Criminal Law it has always been asserted that Volition is of the very essence of crimes & that without sound memory and discretion it is a legal presumption that Volition cannot exist: this quali-

fication

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therefore necessarily arises by implication out of the definition of any crime and never need be expressed.

Without sound memory and discretion he who kills a fellow creature is guilty of no offence much less of Murder. 4 Bl. 26.

Second "Unlawfully killeth". By unlawful killing is meant a killing without justification or excuse: and it must be actual killing or abstraction of life. 1 Bl. 176. 1 Hal. 225-6.

Not only the directly and actually taking away the life of another, but any act which is the cause of another's death is a killing if it be committed wilfully & maliciously, it is murder. Therefore ^{the} of a son wilfully exposed his sick father to the cold air in consequence of which he died, it was held to be murder. So where a mother maliciously left her infant in a field where it was stricken by a kite, so that it died, she was adjudged guilty of murder: and the same decision was that where a sailor confined his prisoner in the same room with another who had an infectious disease and thereby caused his death. 1 Hal. 118. 4 Bl. 176. 1 Hal. 118. Finch 148. Leach 62-141. 1 Hale 431-2. 1 Bl. 176-177. Strange - 856. 883. 884. 1st May 2nd 1578. 1579-8. Palmer 545.

If a person keeping a beast that is used to do mischief, turn him loose for the purpose of frightening or injuring another & if any one is killed thereby, it is murder. But it seems that if the beast were allowed to do it without being used to do mischief, it would be manslaughter only. 4 Bl. 177. 1 Hal. 430-1. 1 Hal. 118. Palmer. 431. 3 Bac. 663-4.

So where the actual killing is by the hand of another, as where one incites a mad man to the homicide, or by duress or perjury causes one to swear falsely, by means of which a third person's life is sacrificed, it is in both cases murder. The instigator being guilty of a killing within the rule. Kelly - 53. 1 Hal. 431-6. 442-467. 4 Bl. 176-7. Finch - 152. Leach 62-74. 1 Hal. 49. 119. 3 Inst. 91. 8 Co. 467.

But it seems to be a question in England whether if death ensue from

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from False Witness come with intent to take away another life, it is a killing within the rule. But whatever doubt there may be as to our Law as to this crime; it is settled in Connecticut by Statute that he shall be punished with death. But the Stat. does not determine that the false witness is guilty of homicide; for it only enacts that if any person commit perjury with intent to take away another life he shall be punished with death. Hence it may be a question under the Stat. whether the bearing false witness with the intents to take away another life shall not be punished with death, though no life by such false testimony is sacrificed. Stat. Connecticut - 182. Forst 122.2. 176 and 119, 38.5c 48. 45c. 196.7.

If a Physician administer a poison, or a Surgeon performs an operation whereby his patient is killed it is homicide per se. Infamously, but if the persons officiating were not a regular Physician or Surgeon, the homicide would be manslaughter at least; and as the case might be murder. The reason of this rule seems with propriety to be doubted. 1 Haw - 131. 1 Hal - 430. 3 Bac - 664. 4 B & 2197. 2 Salk - 251-7.

No person can be judged to have killed another within the rule unless the death ensue within a year and a day from the commission of the act, or rather of the stroke given, or cause of death administered - in the computation of this time both the day on which the injury was given & that on which the person died are reckoned inclusively. 1 Haw. 119. 4 B & 194. 3 Bac. 64. 665.

But it is no excuse for the slayer: should the death happen within this period, that the party might have recovered, if proper care had been taken or skill used. Yet if the Wound or hurt given is not mortal but the person dies of the medicine administered, he who gave the Wound or hurt is not guilty of a killing within the signification. Yel. 26-30. 1 Hal. 428. 1 Haw. 119. Keble 17. 3 Bac - 665. 3 Salk 35.

A person indicted for killing in a particular manner, as

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by drowning, cannot be convicted of killing in a wholly different manner as by poisoning; but he may be convicted, where the difference is only circumstantial, as where the killing is stated in the indictment to have been done with an axe, proof of a killing with a sword is sufficient. 2 Hal 271. 9 Co-67. 4 Bl-196. 3 Inst 319.

But if two are involved of Murder, one as principal in the first degree and the other as principal in the second degree: it is immaterial which is proved to have perpetrated the crime, for there is no difference in their guilt. 9 Co-67-112. 4 Co-42-B. 2 Hale 292. Plow 98. 2 McHally-522^{see}

It is laid down in Leach that an indictment for murder must state: that the deceased received a fracture, the fracture, a moist bruise or wound, and that without this it is bad. Yet where the means were not violent, as where poison is administered, the Law must be otherwise. Leach. 6 L-98.

Third "Any reasonable creature in being & under the King's peace". Themselves, but-laws & all other persons except alien Enemies, in time of War, are as much under the King's peace as natural born subjects who are not under sentence of outlawry, nor convicted of any crime. 4 Bl-197-8. 1 Haw-121. 1 Hal-433. 3 Inst. 50. —

A Child in Ventre sa mere is not sufficiently in being within this definition to be the subject of Murder: but the killing of such Child is a great misdemeanor or misprision of felony. 3 Bac 665. 1 Haw-121. 4 Bl-198. Kely-71.

But if one inflict a wound or hurt upon a Child while in Ventre sa mere which Child is born alive, but afterwards dies within a year and a day, from the time of such wound or hurt is given in consequence thereof it is murder. 3 Inst 50. 1 Haw-121. 4 Bl-198. 1 Hale-433.

By the words "reasonable creature" in the definition must be meant

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meant human brutality. "Reasonable," being used in contradistinction to the ~~spelt~~ "Brute" & not to the term unreasonable.

It follows therefore that a mad man or an Idiot is as much the subject of Murder as the most wise and considerate of the human species. 1 Hare 118. 1 Hale 431. 462. 1 Hare 121. Kelly 427. 1 Hale 429. F 433.

If one counsel or abet another to kill an unborn child and it is done after the birth, pursuant to such advice, the counsellor or abettor is guilty as accessory before the fact, to the crime of Murder. (Supra.) In England by Stat. 21 Jac 1. & by a similar one in Connecticut, it is provided, that if the mother of a bastard child, endeavor to conceal its birth & death by a secret Burial or by any other concealment, she shall be deemed guilty of Murder unless she can prove by one witness at least that the child was born dead. 4 Bac - 685. P. 663. 1 Hare 121. 2 Hare 619. Kelly 32. 4 Bb 198.

The provisions of this Stat. evidently throw the onus probandi upon the mother, but in practice, both in Eng^d and Connecticut, it has always been the custom to acquit the mother, unless there appear presumptive evidence at least that the child was born alive. 4 Bb 198. 2 Smith 363. 4.

In Connecticut this Stat. was repealed several years ago & a new one enacted subjecting the mother, who conceals the birth and death of a bastard child, unless she can prove that it was still born, to a natural death, to mild penalties, but leaving such concealment to raise no special presumption against her that she murdered the child.

Fourth "With Malice aforethought" either express or implied Malice aforethought is the very essence of Murder and is the grand characteristic which distinguishes this from every species of homicide.

Malice as already defined, is not restricted in its signification to any particular malice or spite to an individual, but comprehends any unlawful or wicked motive any, evil design in general which

which indicates a wicked depraved & malignant heart. 2 Ball Sup: 46.
Tot: 256. 4 Bb 198. 9. Kely 26.

The specific difference between Murder and manslaughter is this - Manslaughter is the effect of sudden passion where it is voluntary, while murder arises from the deliberate wickedness of an evil heart. 4 Bb 196.

It is the province of the Court and not of the jury to judge of the malice entertained by the prisoner: but whether those facts exist which constitute the malice is to be decided by the jury: the latter being a mere question of fact & the former of Law. The Law is frequently so interwoven with the facts that the jury decide both. 1 May 21483. Stra 193. 1 Burr 396-414. 2 Burr 937. 2 Mally 374.

Malice or as it is termed Malice prepense is of two kinds Express & implied. (The distinction is not well defined in the books.)
II Express Malice. Malice is said to be express where one with a deliberate and formal design to kill in pursuance of that design, does actually kill another. This preconcerted design is evinced from a variety of external circumstances: as by lying in wait, a former -
grudge.

It is also said to be express where an act is done which indicates malice against all mankind, as by discharging a musket into the midst of a multitude whereby one is killed. 4 Bb 199. 200. Tot: 261. 1 Haw-122-127. 121. Fel-129-30.

So if one kill another in a duel, the malice is express, for there was a deliberate design to kill, and it is no excuse for the slayer that he was first attacked that he accepted the challenge with reluctance, or that he attempted to disarm his antagonist only. And secondly are guilty of murder by express malice as principals in the second degree. 1 Bull. 86-7. 2 Jic 129. 1 Haw-443-451. 4 Bb-199. 1 Haw-124.

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The giver of a challenge is at law guilty of a high misdemeanor, for it tends to a breach of the peace & to the commission of felonies. 3 Ene 551.

If a person without any but a slight provocation suddenly attacks and kills another he is guilty of murder by express malice. Fort 255. 1 How 124.

So though the provocation were greater if the slayer beat the other in a cruel dangerous & unusual manner: & death ensue, it is murder & the malice is express. 1 How 126. Kelly 127. 1 Hale 454-473. -

If one in a sudden quarrel kill another while he appears to have the command of his passions, he is guilty of murder by express malice: In such case if the acts had been done under the influence of passion it would have been manslaughter only. 5 Ene 56. 1 How 123.

II Implied Malice. - Where the killing is in consequence of an act, which has some other object in view, than the homicide committed, the malice is implied. As if poison be exposed for one and taken by another. Fort 261. 9 Ene 81. How 126. 1 Hale 436-441. 467.

If one kill an officer in a struggle to escape or to prevent an arrest, he is guilty of murder by implied malice because his principal object was not to kill, but to escape from the officer. Leach 6 L 115. Fort 29-135. - 308.

It is no excuse for the party that the arrest was erroneous - for such act is not void but only avoidable. Neither is it necessary that the officer should make known the cause for which the arrest was made: but there is a difference between a known and public officer & one specially deputed to make a particular arrest the latter being bound to ^{execute} his warrant and make known the cause of the arrest while the former is not. 1 How 129. V 130. 9 Ene 66-8. Fort 137. - 311. 312-318.

The prosecutor is not bound to prove that the person attempting the

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the arrest was an officer but merely that he acted as such it lying upon
the other party to show that he was ^{not} an officer. 11th Nov. 2d May 480.

Self homicide is forbidden to be maintained for a man to kill himself
being proved, it is an offence on the stage to show that it was accom-
panied with malice, or other with he will be deemed guilty of murder. 9th 2d
6th 2d May 546. 1st 27. 1st 283. 1st 124.

murder may be deemed either by showing that the homicide
was justified on the ground of a command, or permission, or the duty
to save, or on the principle of misadventure, or self defence, or all or part
with manslaughter, because the involuntary consequence of some act
not strictly lawful but not amounting to a felony, or occasioned by
some sudden and violent provocation. 4th 201.

The punishment of murder is death; the it is however only a clergy-
man being. But by Statute 23 Henry 8. 18th 3. 4th 5. 7th 11th 12th
the benefit of clergy is taken away in all cases of murder & even those
acceptors share the fate. 1st 45. 2nd 78. 6th 1st 480. 2nd 57th 5th 53.

By virtue of statute, the crime of murder is in Connecticut - pun-
ished with death. The sentence of the Court is that the prisoner be hanged
by the neck till dead. 7th 201.

As the punishment of the Court is the prisoner be hanged by the
neck till dead, or it must be executed & if he is cut down before he is
extinct, and he afterwards recovers animation he must, unless the Court
warrant, be proceeded with to a second hanging. 2nd 412. 2nd 658. 1st 947.

It is a rule of common Law, that if a woman is condemned to death during
gestation, the infant remains alive, Execution must be stayed until she is deliver-
ed. 2nd 658. 2nd 413. 7th 574.

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Feit Treason

In certain cases the killing with malice aforethought from its particular atrocity is called Feit Treason - but whatever be its aggravations it is essentially the same as murder. Stat. 117. 107. 324. 336.

Many things were formerly called Feit Treason that are not at this time so considered. At Forney, disclosure of the King's Council by a Grand Jury, or an attempt of a Wife to murder her husband. (see below)

By Stat. 25 Edw. 3 Feit Treason can happen in three cases only. I. where a servant kills his master. II. A wife her husband, and III. An Ecclesiastic his prelate. This last species cannot exist in this Country. 1 Hale - 146. 1 Hens 131. 3 Inst. 20 - 1. 1 Hale 377.

The killing of one's master or husband is called Feit Treason because in addition to the crime of murder there is a breach of private allegiance. Stat. 107. 324. 336.

The killing of one's husband or master is not Feit Treason unless the killing of a stranger under like circumstances could have been murder.

If a woman divorces a man at thoro from her husband & kills him it is Feit Treason - but if the divorce had been a vinculo matrimonii it would have been murder only: for by such divorce the marriage relation is entirely dissolved.

If a wife or servant procure or abet a stranger to kill the husband or master they are accessories to murder only: but if a stranger counsel or abet a wife to kill her husband or a servant to kill his master and the crime is perpetrated, the stranger is accessory to Feit Treason for Accessarius sequitur reum sicut principalis. Stat. 20 - 139. 1 Hens 132. 1 Symb - 128. 332.

Though the Stat. 25 Edw. 3 provides that no murder shall be

accounted.

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accounted Peit Treason but that of a husband by his wife, of a Master by his servant & of a Prelate by his Ecclesiastic from whom he is entitled to obedience. Yet if a servant having no Master murders his mistress, it is construed to be Peit Treason within the Equity of the Statute. Plow. 36. 1 Hen. 132. 3 Edw. 142.

The murder of one who has formerly been a master, in execution of a malicious design formed while a servant, is Peit Treason. 1 Hen. 132. 1 Plow. 266. 16 Edw. 99. 3 Hen. 142.

The murder of a parent by his son is not Peit Treason, unless the son or child is by reasonable construction the servant of his parent. 1 Hen. 131. 2. 1 Hen. 380.

Peit Treason, is a Capital Felony, it was formerly delegable, but was ousted of this benefit by Stat. 12 Henry 7. which took it away from both principal & accessory. 1 Hen. 131. 2. 3. 5 Edw. 141. 2. 1 Hen. 380. Plow. 266. 16 Edw. 99. 4 Edw. 264.

The punishment of Peit Treason, if the offender be a male is to be drawn to the place of Execution and there hanged till dead — If a female to be drawn to the place of Execution & there be burned to death. 9 Hen. 636. 1 Hen. 133. 1 Hen. 380.

Arson is at Common Law the wilful & malicious burning of the house or out house of another. 4 Bl. 220. 1 Hen. 556. 3 Hen. 66.
Under this definition not only the dwelling house but all the out houses within the curtilage or homestead may be the subject of Arson. 4 Co. 20. 1 Hen. 136. 163. 4 Bl. 221.

Yet it seems that at Common Law a Barn filled with corn though not within the homestead may be the subject of Arson: and formerly the burning of a stack of corn was deemed Arson, but this is not now the case nor has it for a long time been so accounted. 1 Hen. 165. 6. 4 Bl. 221. 3 Hen. 67.

Burning the frame of an unroofed house is not Arson, it

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not having been a year within the cell. Had - Feb. 16. 5. 1874.

It common prison or county jail is called Jackson, for this is a
house it being the dwelling of the prisoners, & in this case the indictment
must state the burning to be of the house of the County. Sec. 11.

It is said in the Eleventh Book, that persons may be committed
by the burning of one own house. But this rule as expressed, is not true.
For according to the definition it must be the burning of the house of another
& if this happens consequentially, by reason of the burning of one own house,
done wilfully & maliciously to effect that consequence, then can it be
said but it must be Arson. Arson 371. 7th. 229. 2nd. C.L. 217. 219. 2nd. 116.

It is an established rule that if one seized upon or possessed for years only of a house even in a city, set fire to it with intent thereby to burn the house of another, he is not guilty of a crime unless the other house is actually burned. For 113-16. 1 Hens-166. on Carr-336-377. 1 Hale-368-9. See also 29. Lamb, C. 219-9.

And modern cases go still further in favor of the occupier's house.
It has been determined that if one in possession of a house without a lease,
enters upon a new agreement of the owner to give one, or is tenant from year
to year, willfully and maliciously burns it, he is not guilty of Arson. Lawrence
217-235.

Get the bargain of one over house in a city, with intent to own another
thereby, is a high misdemeanor, punishable by fine, imprisonment, whipping,
pillory, & the confiscation of realties. For Life. 1 Hal. 368. 1 How. 166-7 & Kel. 29.

But the arson burning his own house is in ^{no} sense of the Word, guilty
of arson: nor the indictment; if he were prosecuted for that crime, would
be supported. Chely - 29.

On the other hand if the Landlord, or he in reversion, sues the
 leasee of the Tenant, he is guilty & answers. See Co. L. 115. 4. 66. 221.

In Connecticut the game of whist is in a great measure regulated
by law, but is substantially the same as at Common Law. The following

Tallie Xiong

of any out house or house is known, though the out house is not within the homestead. Our Law provides the same punishment for the burning of any ship or vessel, as for the burning of a house, but it would seem hardly proper to call the burning of ships and vessels arson. *Stat. Cor - 135.¹⁰⁰*

There must be an actual burning to constitute the crime of Arson: the bare intent, or an unsuccessful attempt, to burn will amounting to the offense: yet if the fire be extinguished after a partial or even small burning or goes out of itself, it is not withstanding Arson. *14 How - 167. 1 Hal - 511. 456. 222.*

The burning must be malicious, or it is only a trespass, as where it happens thro' negligence or want of care & then the party is liable civilly only. *How - 475. 14 How - 167. 1 Hal - 569.*

If however one intending to burn the house of A burns the house of B it is Arson, because of the felonious intent. *14 How - 167.*

Arson is at Common Law a felony punishable with death, at that Law, has never been a capital & so late as the reign of Edw³ the offender was hanged to death. But the Lex Talionis was abandoned in the 25 Edw 3. (*1056 222. 374.*)

When it was enacted by Stat. that the offender should be entitled to clergy; again however he was deprived of this benefit by Stat. 21 Hen 8, which was again conferred in the 1 Edw 6 by the repeal of the stat of Henry.

But it was finally ousted of clergy as it relates to the principal offender by deduction from Stat 48 3 Phil & Mary which expressly denies it to accessories before the fact. *2 How - 481. 503. 456 222.3.*

In Connecticut the crime of Arson is committed by the person of the age of sixteen years is by Law punishable with death, provided any life be thereby endangered or prejudiced: if the person committing the offence is under the age of sixteen Mr G¹ supposes he would be liable for a misdemeanor only and not as at Com Law, because our Stat makes

offenders

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offenders who are of this age punishable only as at Com Law.

By a second Act upon the same subject it is enacted "That if"
 "any male person of the age of sixteen years shall wilfully & feloniously"
 "burn or attempt to burn, by setting on fire any dwelling house, barn, or"
 "out house, shop, store, ship or any other vessel and mischief or hazard"
 "happen to the life of any person thereby he shall be sentenced to Newgate"
 "at the discretion of the Superior Court for a term not exceeding 7 years. Stat. Com 185"

And for a second offence of the same kind he
 may be sentenced to New Gate for any limited period, or for the term of his
 natural life:— But in such case the second offence must have been committed
 subsequent to the conviction of the first. 2 Buls - 349. 1 How - 168. 1 Hale 524.

By this second Act respecting arson it is provided that if the offender
 be female, she shall be sentenced to imprisonment in some borstal, jail or
 Work house for the same length of time as if a male he would be subjected to
 confinement in New Gate. The age of the female is not mentioned but it
 is supposed to be sixteen.

Public Rights

If a person leases a shop or building which is within the Curtilage of his Mansion house it is thereby severed & will not be a subject of Burglary, unless the lease make it a mansion house by lodging in it. 1 Hal-558. 1 How-164. 4 B.C.-225.

It is not necessary that a house be actually lodged in, at the time the offence is committed, to make it a subject of Burglary: for if it be left by the owner for a short time vacant & reverted and is, it will still be deemed his Mansion or dwelling house. 4 Co.-46. 1 H. 77. 1 Hale-586. 1 Hal-46-52. 67. Moore-660. 1 How-162.

The house of a Corporation, provided any of the members or their agents lodge in it, is within the ^{subject} definition of Burglary - not as the Mansion house of the Officers or Agents, but of the Corporation. Leach-67. 1 H. 38. 1 Bac-335.

It has been decided, where one has hired a house for the purpose of residing in it & has moved his Goods to it - & there only - that he has obtained such possession for the purpose of residing in it, as will from the time of that possession make it a subject of Burglary. Kelly-46.

The subject of Burglary must be a permanent structure. Hence a Tent or Booth by being broken and entered, will not render the Luppapar liable as the committee of Burglary. 1 How-164. 4 B.C.-226.

It seems that whatever is Burglary at Common Law is so in Scotland under our Statute - & by the Stat. it is provided further that the offence may be committed upon any Shop or Store containing Goods or Merchandise, though not within the Curtilage or Homestead - and though no person lodge in it. Hence it has been decided by our Courts that the Cabin of a vessel containing Merchandise may be the subject of Burglary. 1 Root-63.

The Statute requires the Burglary be committed upon the Mansion house or another and the indictment must state upon where the Burglary was committed. and if it is alleged to have been

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done on the house of A. proof that it was done on the house of B will not support the indictment. See 4 L. 243.

Of the time of commission.

According to the definition Burglary can be committed only in the night season: This was formerly considered as comprehending all that period of time between sunsetting & sunrise. But now it means only that time which intervenes between Evening & Morning, Twilight, so when there is no daylight sufficient to distinguish a person's countenance. Moon light will excuse from committing Burglary. 1 Co. 6. 1 Hen. 166. 1 Hale 330. 2. McKeay. 600 - 1. 4 Bb. 200 - 1. 224. 1 Bos. 334.

Of the manner of commission.

From the definition it also appears that there must be both a breaking & an entering to constitute the crime of Burglary: hence if one is done and not the other the crime is not complete. But the breaking & Entry need not immediately succeed each other: for if the breaking is at one time & the Entry at another it is still Burglary. 1 Hyl. 67. 8. Lush. 342. 4 Bb. 226. 1 Hale 331.

The breaking may be effected not only by demolishing a side of the house, or a part of the Wall - breaking in a door or the like - but by loosening any fastening whatever, as by turning a Lock - Lifting up a Latch - taking out a Window - breaking a pane of glass, or any similar act will amount to a breaking within the rule. 1 Hars. 166. Felt. 169. Poley. 67. ^{in Hars.} Hale - 26. 1 Hale - 308. 327. 331 - 2. 333. Lush. 342. 4 Bb. 226.

An actual breaking is not required; a constructive one is sufficient. & it has been determined that an entry by a Chimney, altho' there is no breaking, is Burglary. For a Chimney is as much closed as its nature will admit. (see below)

But to enter through an open door or window is not Burglary, there being in such case neither an actual, or constructive breaking. & how-
ever after such entry, an inner door or part of the house be broken it is

sufficient

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sufficient to constitute this offence. 1 How-166. 1 Hal-67. 2 All Nally-601-2.-
 108-9. 1 Hale-553. 4 Bl-226.

Yet the breaking of fixtures, as of a Chimney or of a Traveller, is not a breaking that will constitute Burglary. 108-9. 1 Hal-31.

According to the Witch & Authority, it seems to be settled, that if one makes an assault upon the house of another with intent to commit a felony, & enters by a door which is opened by the owner, this entry is said to be burglarious, and it therefore amounts to a constructive breaking. 1 How-166. 1 Hal-43. 2 All Nally-662. 1 Bac-333. 232. 1 Anderson-115. 4 Bl-226.

Whether the breaking out of a house, when an entry has been made within intent to commit a felony, but unaccompanied with a breaking, is at Com Law burglarious, there are contradictory opinions. But by the Stat. 12 Ann. C. 7. it is declared that the breaking out is as much within the definition as a breaking in. 1 How-166-1. 1 Hal-384. 4 Bl-227.

Mr Gould thinks that a breaking out, in commercial, would not be a sufficient breaking to constitute a Burglary.

Of the Entry.

If an entry is procured by fraud & a felony is committed it is Burglarious as tho' obtained by force. Thus if one procure an officer to enter under a pretence of searching for stolen Goods, merely to cover his intent to commit a felony, & steal from and rob the house, he is guilty of Burglary. 1 How-166. 1 Hal-42. 1 Bac-333. 1 Hal-532.

From the definition it is clear that the entry must be forcible for that is implied from the word "breaking".

If the servant of an Innkeeper with a felonious intent break and enter the room of a Guest, it is Burglary; and must be described as upon the main house of the Inn and not as the Lodger. 1 Hal-67. 2 All Nally-601-3.

No servant within the house, can rob it of a person in from without;

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for the purpose of committing a Felony, both are guilty of burglary, if the Entry is effected. 2 M Wally - 604. 4 B & - 227. Strange - 881. 1 Hawk - 162.

It is agreed that the least entry, with the whole or part of the body, or with an instrument for the purpose of committing a felony; or with a hook to draw such goods, or with a Weapon to intimidate those within to hand forth their property, is within the Law a burglarious Entry. 1st Ed - 108. 1 Hawk - 161. Kelly 57.

But an instrument with which the entry is made, must be introduced for the purpose of perpetrating the felony, & not for that of obtaining admission into the house, as where a key was inserted & the bolt of a lock on the inside turned, or a gimblet bored so that the Chips fell within the door; It was held not to amount to an Entry, because the instrument was not introduced for the purpose of perpetrating the felony therewith. Luck - 342. 1 Hawk - 162. Mac - 1 Bac - 334. -

If on an indictment for breaking, entering & stealing, the accused is acquitted of the burglary, he may still be convicted of the Larceny. Luck 61. 87.

The breaking & entering must be with intent to commit a felony in order to constitute burglary, & if there be not a felonious intent the person so entering is guilty of a trespass only. As where a servant having been away from his master - returned on the night, broke into his master's house and took from thence his ^{own} clothes and money only. But the intent shall always be presumed to be felonious, unless the contrary is shown. 1 Hale 362. Kelly - 30 - 67. 1 Hawk - 164. 4 B & - 227.

In point of intent, it is sufficient, if the act intended amount to a total Felony only, & were not so at Com Law; for an act made a Felony by Stat, has eo instanti all the incidents of a Com Law Felony attached to it. 1 Strange - 480 - 1. 4 B & - 228. 1 Hawk - 336. 1 Hawk - 164.

Neither is it necessary that the felonious intent be executed; the bare intent is sufficient though not accomplished, and the Existence of such intent is to be determined by the Jury. 1st - 109. 1 Hawk - 159. 1 Hale - 549.

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After one has been acquitted, he cannot afterwards be indicted for the same breaking & entering the house of B. For the breaking and entering are of the essence of Burglary, & the stealing only a circumstance attending it which goes to prove the felonious intent. Nel. 36-52. 2 How 522.

It can turn the offence of Burglary into a misdemeanour, by being committed by a child, however is taken away from the principals by Stat. 1 Edw. 6 c. 3 18 Edw. 2. Also from accessories before the fact by Stat. 34 & 35 M. 1 c. 336-2 Hal. 364. 4 Bb. 228.

In London it is provided by Stat. that for the first, if the offender is a male, he shall be confined in New Gate for a term not exceeding three years - for the second for a term not exceeding 6 years - & for the third offence he shall be confined during life. Statute 184.

And as to what shall be esteemed the first offence: all the offences which shall be committed before the first conviction: shall be considered as constituting but one offence, and shall be punished as such & so of the second.

The same distinction between male and female offenders is made by Stat. on this subject as is made in the case of thieves: the latter instead of confinement in New Gate, is to be imprisoned in some Work house or common jail, in the County where the Crime was perpetrated, for the same time as male offenders are liable to confinement in New Gate.

But for the first offence, if the burglar, in committing the same, shall be guilty of any personal abuse, force or violence, or have about him any dangerous Weapon, so as clearly to indicate intention of violence: he shall be punished by imprisonment in New Gate for life.

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Larceny.

Larceny is that in common parlance is called, Theft. It is of two kinds, Simple & Mixed. Simple Larceny is plain theft, - unaccompanied by any legal appropriation. Mixed or burglary Larceny, includes in it the appropriation of entering some one's house or person. 4 B.C. 227. 1 Hare 154.

Simple Larceny.

Simple Larceny is the felonious taking & carrying away of the personal Goods of another. It is divided into two kinds, viz: Grand & Petit Larceny. If the value of the Goods amount to more than $\text{£}12$. s. sterling, the offence is at common law denominated Grand Larceny, if under the value of $\text{£}12$. s. Petit Larceny. So that the difference between Grand & Petit Larceny, consists in the difference of value in the Goods stolen, both kinds being with equal intent, comprehended in the general definition. 4 B.C. 227. - 1 Hare - 503. - Tot. 121. 1 Hare - 148. 6. Tot. 70. 4 B.C. 229.

The difference of the punishments of these two kinds of Larceny is however material. 4 B.C. 229.

If several persons in conjunction take Goods exceeding the value of $\text{£}12$. s. it is Grand Larceny in all of them, But if the same persons at different times take Goods, which in the aggregate exceed the value of $\text{£}12$. s. still he is guilty of Petit Larceny only. 1 Hare - 148. 5. note. Lock. 62. 265. 1 Hare 50. 1 Hare 719.

According to the definition of simple Larceny, the possession must be from the possession of the owner, but that possession may be either actual or constructive. 4 B.C. 233.

It is said that every larceny & of course every Larceny includes a trespass; hence no one can be guilty of Larceny in taking and carrying away Goods unless he has thereby committed a trespass. But this rule seems to have been infringed upon by late decisions, & in fact since it was laid down, the law on the subjects of Larceny has undergone great changes.

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An actual possession is defined by the way in which it is expressed: but a constructive possession or possession in law is meant a right of present possession. 11 R. 480. 45 R. 439. 7 R. 9.

There are unnecessarily many cases that will fall within the above rule & many that will not. And it is said, if one possession of Goods by delivery embodies them, he is not guilty of Larceny, as where a carrier or Taylor embodies the Goods entrusted to them. But the carrier & Taylor cases, according to the late decisions, cannot be said. For it has been held even at the late Bailey as a general rule, "that when Goods are delivered to another by the owner, for a special purpose, the owner having a right to countermand the delivery, the possession constructively remains with the owner, & therefore if the Bailee converts them to his own use, without fraud he is guilty of Larceny." As where a watch was embodied by the goldsmith with whom it was left to be cleaned; Clothes by a Laundress; & Equines by the person with whom they were deposited. 11 How. 135. 1 Law. 113. 2 Burr. 712. 5. 1 How. 154. 5. 2 B. 472. But it has always been agreed that if one obtains possession of Goods without fraud, with intent to embody and steal them, & actually does steal them, that he is guilty of Larceny, though the owner consented to that possession, for such consent thus fraudulently obtained is void & the law will permit no one to practice a fraud upon it. 11 How. 135. note. 1 B. 31-2 or 31. Leach 75. 215. 231. 266. 291. 338. - 6

If one apply to another under pretence of purchasing Goods, but with intent to convert them to his own use without paying for them, he cannot be considered guilty of Larceny, for such purchase supposes a bailment in this, that the owner by a sale a bona fide act right and claims to both the possession & property of the Goods sold, but in case of a bailment the Bailee retains the right of property, even according to the terms of the contract. Leach 75. 338. 44.

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If one obtains by authority of Law with a fraudulent intent, it will in some cases be Larceny. As if A under a Replevin get possession of property with intent to embezzle & convert it to his own use. B being the person really entitled to the Replevin, & who was personated by A. 5 Inst 108. Fel. 45. Ray 276.

If Goods are taken by Execution the Judge, having been obtained by fraud, inquisition proceeds on the writ, for the Judge is bound to deliver the Goods, it is then in fact a conversion is committed against B by A. Suppose C, a third person, personates B & it is for a difficulty so that A may obtain judgment and Execution, the writ is obtained B's property. The Judge's writ & Execution in such case are both void & A, by obtaining property by means of them is guilty of Larceny. 1 Ray 276. Fel. 45. 11th 136.

When Goods or property of any kind is bailed, on the special condition of being carried to a particular place, and the Bailor conveys them to another & then converts them animus furandi, he is guilty of Larceny. Fel. 45. 11th 66. 5. 7th 236. 11th 236. Leach 359.

When one lends a horse to another for a particular time, he has no right to countermand that bailment till the time expires, & if the bailee within that time sell or convert him, he is not guilty of Larceny. Co. 211. 353. 4th 11th 58. 15th 4. 2d Mc Hally 592. 4th 280.

On a view of the whole subject of Larceny as connected with the subject of Bailments, it may be observed that; First, where according to the terms of the Bailment, the bailor has no right to countermand the delivery, at the time of the conversion, the bailee is not guilty of Larceny, unless he originally obtained them animus furandi. Second, if the bailment were such that the bailor might at his pleasure, countermand the delivery, a conversion animus furandi, amounts to Larceny. And Third, where the bailment was originally obtained with intent to steal, a conversion is Larceny, whether there was a right of countermanding the bailment in the bailor or not.

The bare non-delivery of Goods to the bailor is no evidence of a

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conversion, even where by the terms of the Bailment the Bailee is obligated to ~~return~~ it would not be so considered even in the civil action of Trespass.

Neither is it evidence of a felonious intent. But a refusal to restore the property on request, would be evidence of conversion, ~~and in the case might be a plea~~ ^{456 235} ~~in intent~~. It is a rule of the Common Law that if a servant remaining with and removing the goods of his master, with which he has been entrusted, be guilty of larceny; but not by that unless he be of the age of 18 he is not; nor even then unless the value of the thing exceed 40 Shillings - 1 Hale 587. 1 Hawk 99. 100 200.

At Common Law a servant not having the possession but the care of his master's goods and taking them carrying them away, he is guilty of larceny. As if a Butler should take plate or a servant household furniture. 1 Fulk - 84. 1 Hale - 585 - 6. 1 Hawk - 136.

And upon the general principle of constructive possession, if one steal goods and then steal them from him, the latter is guilty of a taking from the owner, the goods being considered as all the while having remained in his possession. 1 Hawk - 136 - 7. 1 B. & M. 79. 2 M. Chalmers - 589. 2 B. & M. - 473.

If one steal in the County of A & carry them into the County of B, he is guilty of larceny in both Counties, every continuance of carrying away being also deemed a re-taking. The felon may therefore be indicted in either County but not in both. 2 B. & M. - 473. 1 B. & M. - 79. 1 Hawk - 136 - 7.

But this rule cannot hold where goods are conveyed from one foreign country to another, for in the two countries the punishment for the same offence may be materially different. In one state, the offence of hoarding may be punished separately in the other with temporary imprisonment neither can one state take judicial notice of the penal law of another state there being strictly local. What Page - - Sec. 149.

If the Wife of A clandestinely delivers the goods of her husband to B, the latter is not guilty of larceny tho' he may be liable civiliter, but there is no other civil or domestic relation, which will excuse the receiver, so that

a child

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a White servant for the would be Larceny in both.

Carrying away

From the definition of the offence of Larceny it appears that there must be not only a taking but also a carrying away or the crime is not committed. 1 Hawk. 171. 2 Benc. 215. Fel. 108. Keely. 31. Lamb. 147.

But it is settled that the last removal of the Goods from the place where they were found is a carrying away within the rule. As to carry from a Chamber down stairs, or to take the Goods from the chest & lay them by the side of it. but the raising a bail of Goods from its side and placing it on one end, was held not to be a sufficient carrying away. Yet the removing of a coil from one end of a carriage to another was deemed a carrying away. (same author) 5 Inst. 119-7.

Felonious

There must be not only, a taking & carrying away but that taking & carrying away must be felonious or animus furandi. if the taking is not with a Felonious Intent - it is a mere trespass. Whether the taking is Felonious will always depend upon the attending circumstances of the case, & by these the jury, who are to decide the question, will generally be enabled to do it without difficulty. 1 Hale. 509. 4 Benc. 232.

The taking & carrying away in a clandestine manner generally evinces the animus furandi, tho it is not by any means conclusive. But where the taking is without the knowledge and against the will of the owner, it is presumptive evidence of a felonious intent, which, however may be rebutted, but if not rebutted, will become conclusive. Lamb. 62. 207.

Of the personal Goods of Another

It further appears from the definition of Larceny that the taking

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and carrying away must be of the personal Goods of another Hence things real or growing of the realty cannot be the subjects of Theft. Land cannot be removed, & Great Wrecks Found & discovered from the Freehold are not within the Law. 4 Bb. 232. 2 Crim. 470. 1 Vent. 187. 1 Hawk. 171. 1 Holt. 87. 1 Hale - 509. 512.

But if these or other things savouring of the realty, are first severed, and afterwards taken, if such taking is not a continuance of the original act of severance it is Larceny, as is the severance should be one and night, & the taking on the next. 1 Hal. 311. 1 Hawk. 171. 5 Inst. 109. 4 Bb. 235.

It has been questioned, absurdly enough, whether taking wool from a sheep's back, ^{is} Larceny? it has been settled in the affirmative. Leach. 137. 2 Leach. 375.

The difference in the Law as it relates to such things as appertain to the Freehold, such as, are merely personal is founded on the circumstances of the case: for articles adhering to the Freehold are so valued in proportion to their ^{value}, & with such difficulty, ^{found} that their safety is sufficiently protected, by subjecting the Wrong done in such cases. 4 Bb. 467. 1 Hawk. 172. 1 Inst. 202. 2 Inst. 109. 1 Hale. 311. 467.

Formerly it was held, that the taking of dead & chattel of Land was not Larceny, because they relate to the realty, & are not merely personal, in consequence of the Law: There is no theft in such cases. Besides being Chattel in action merely extending right to property but being of an intrinsic value they might on that ground be considered as not within the Law; but by Stat. 4 Geo. 2 Ch. 1. in relation to movable subjects of Larceny. It gave a similar Statute in consequence. 2 Inst. 470. 5 Inst. 109. 1 Hale. 66 - 81. 4 Bb. 234. 1 Hawk. 173. 1 Hawk. 172. 1 Hawk. 173.

Property must not only be of intrinsic value, but also, belonging to some one, so it cannot be the subject of Larceny. Hence the taking of Animals in the wild, unclaimed cannot be Larceny. The rule is the same as it

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it respects fish in an open river. 366. 1 Hale - 511. 1 How - 143. 4. 1 Mac - 471. 486-325-235.

But animals, which were originally or are commonly ferae naturae may have become the subjects of larceny by being reclaimed or confined if they are of intrinsic value, or according to the general rule they will serve for food. 2 Inst - 373. 72236. 1 How - 243. 3 Inst - 109.

But such animals as will not serve for food are generally exempt from the value of larceny though reclaimed or confined will only give the owner an action Comitatus for trespass against any one who shall take them away. 1 How - 143. 2 Mac - 471. 3 Inst - 109. 1 Hale - 512. 2 Inst - 393-37. 72235.

Yet the taking of a domestic animal is larceny both at common law & by statute. 24 Ed 3. 2 Bac - 471. 1 How - 143. 3 Inst - 109. 1 Hale - 511.

But domestic animals may be valuable though not serving for food as horses, mules, &c. those that serve for food are of small value. In this offence whatsoever, beasts, birds, game, pasture, &c. 2 Bac - 236. 1 Hale - 511. 1 How - 144.

But some domestic animals as cats & dogs are not deemed valuable in the law but in them is only a civil trespass. 2 Inst - 273. 1 Hale - 143. 2 Inst - 471.

As all personal Goods may be the subject of Larceny, so also may money or cash. Leach - 48. 56. 234. 413.

It has been observed that property without an owner is not the subject of Theft, Trespass, Writs & Estreats, all within this rule. 1 Hale - 144. 1 Hale - 512. 1295. 2 Inst - 295-7.

But though there must be a property in some one at the time of taking; yet it is said that the owner need not be known, that one indictment will lie stating the Larceny to be of the Goods of a person unknown. Super 72. 1 How - 144. 486. 235.

It is said in Hale & repeated in Modum that unless the Goods are proved on trial to belong to a stranger, they shall be presumed to belong

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To the prisoner. 2 Hale. 271. 8 Mod. 249. 2 M Wally. 580. 4 Bl. 352. 1 How 145. 3 Inst. 110.

The taking and carrying away of Goods animus furandi, from a parish Church is Larceny, & they may be stated in the indictment as the property of the Corporation. To a wound from a dead body is Larceny, & may be described as the property of him, who put it on. The stealing of a dead person is a high misdeemour, & as such, punishable, (2 Trep. 435. for this last principle) 1 Hute. 145. 2 Trep. 733. 12 C. 113. 1 How. 145. 3 Inst. 110.

It is said that a man may commit Larceny, by taking his own Goods, as where they are delivered to a Carrier and clandestinely retaken & sent to the Carrier, but the rule is not reconcilable to principle, the retaking of the Goods in such case being a mere act of revindication. On Car. 334. 3 Inst. 110. 1 How. 145.

It has been a question, Whether one indicted for Larceny, by Special verdict found guilty of that which amounts to a trespass only, can be subjected in Trespas on that indictment, but it is settled that he cannot.

Punishment

At Common Law, Larceny, whether Grand or Petit is at Common Law felony, & the former Capital, but Clergible of which however it is, in some cases, is not. (By reason in case of stealing from a ship see 1 Hal. 12. 3 Inst. 33) 4 Ed. 55. 15. 17. 25. 7. 8. 1 How. 146. 1 Hal. 69. 2 How. 475.

Petit Larceny is not at Common Law Capital, but is punished by forfeiture of Goods & chattels Whipping & some other Corporal punishments. 1 How. 146. 4 Ed. 95. 77. & the above Authorities.

It is said by Blackstone under the head of Larceny, that Petit Larceny is punished by fine and Whipping only, yet he says in another place that it is a felony, because it works a forfeiture, which is true. 4 Ed. 55. 75. 7.

Under the term Law no distinction is made between Grand & Petit Larceny.

Public Moneys

Larceny all falling under the general appellation of Theft.

All cases where there is an act of larceny by fire not exceeding seven shillings of the value of property, amounts to three shillings & 34^{ths} in addition to the fine the Thief is punishable with Whipping not exceeding ten stripes. If the value of the goods does not exceed 84^{ths} the offender is to be punished as before only. If between 84^{ths} & 85.34^{ths} he is to say the fine imposed or to be whipped not exceeding ten stripes.

The party injured may commence an action in the nature of a Quare Damnum and recover for himself the full damages.

When the value of the goods stolen is less than 10, the offence is cognisable by a single minister of the Law, with a right of appeal in above 5 shillings the Court of Common Pleas have original & sole Jurisdiction.

Mixed Larceny

Mixed Larceny has all the properties of simple Larceny but is accompanied with the aggravation of taking the Goods from one house or person or from both. It is of two kinds, Larceny from the house & Larceny from the person. First Larceny from one person. The kind of Mixed Larceny may be committed by private Stealing from the person or another or by open & violent Assault usually denominated Robbery 486.239. Larceny by privately stealing from one person, as by picking his pocket, is a felony at Common Law, distinguishable into different grades according to the value of the property taken, where it exceeds 12 shillings it is Capital, but entitled to Clergy, or which however it has been enacted by Stat. 8 Eliz. If the value of the Goods do not exceed 12 shillings the offence is not Capital but stands on the same footing as simple Theft Larceny. 1 Haw. 151. 4 B6. 244. Hal. 529. 2 M Wally. 579. Leach. 239. Fost. 73. 2 Hale. 564.

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Robbery

Robbery, or Larceny, by open & violent assault may be defined to be the felonious & forcible taking from the person of another, money, or goods of any value, by, violence or putting in fear. 4 Bb. 242. 1 Hae. 147.

In order to constitute Robbery there must be a taking from the person of another, & that taking must be actual: for an unsuccessful attempt to rob, without a taking is no Robbery. 4 Bb. 242. 1 Hae. 147. & 1 Hale 522. 3 Sm. 64.

But though an attempt to Rob is not at common law a felony, yet it is a high misdemeanor: & now by stat. 7 Geo. 2. it is made a felony punishable with transportation for seven years. 1 Hae. 148. Leach. 22. 2 Bb. 242.

The definition requires the taking to be from the person, but by this it is not meant that the taking must be from the actual manual possession of the person robbed, for if it is taking from his presence, by violence or putting in fear it is sufficient. Thus if through the instrumentality of a third person, a thief take goods from a servant in the presence of his master, it would be a taking from the possession in person of the master. The possession of the servant is constructively the possession of the master. 1 Wm. 533. Stronge - 1115. Galt. 145. 1 Hae. 148. Salk. 613.

Neither is it necessary, that the taking be in fact forcible, it suffices if it be against the Will of the owner. 1 Hae. 148.

If by putting in fear one exact an estate from another to deliver him goods or money at a future period, which is consequently done, it is a constructive taking from the person. 3 Sm. 68. 1 Hae. 147.

But a taking that is not either forcible from the person of the owner, or from his presence by putting in fear, is not a taking within the rule. as if one through fear of an attack abandons his property, which another seizes, who was in fact lying in wait for the owner it is not a Robbery. 1 Wm. 533. Stronge - 1115. 4 Bb. 242.

It is said that if several combine together for the purpose of a Robbery

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Forcibly to extort Money or Goods as with a drawn sword, or in any other threatening & alarming manner, under pretence of begging or of payment is robbery. 1 Haw. 149. 1 Hale 533. 4.

According to some opinions, the compelling of a Market man or Shopman to sell his Goods at their usual price is Robbery, but according to Hawkins it is not, because no felonious intent can be shown: If however the vendor be not a market man, it is still doubtful whether it would not be robbery. 1 Haw. 149. 4 Bl. 243.

It seems that in an Indictment for Robbery it is not necessary to state that it was committed by putting in fear, it is sufficient to state that it was done by violence, & where fear is stated it is not necessary to prove that it actually existed; the allegation is supported by proof of violence or threatening as would naturally produce fear. *Sidem*

If one without colour of right, takes a man's money or claim takes money or Goods from another, by violence or putting in fear he is guilty of Robbery; a mere pretence being no excuse. 1 Hale 53.

Mr. G. supposes that an operating from one's person, or taking all that without previous violence & putting in fear is no felony: it cannot be simple larceny because the taking is from the person: and as it is done secretly it cannot be larceny by privately taking from the person nor can it be robbery because it wants the requisite of violence or putting in fear. *Sidem* 224. *Reg.* 278-6. 1 Haw. 151. 2 Hall 134. *Kel.* 40-43. 1 *Sid.* 254.

Punishment of Robbery

Robbery at common Law is a Capital but a heinous felony, but of this it is altered by Statutes. 23 Geo 8. and 3 Geo 4. which last takes it from capital above the fact. 4 Bl. 243. 1 Haw. 50. 140. 150.

See too the offence of housebreaking and burglary are punishable by the same law. vide title "Burglary."

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The words "force or violence" is "personal abuse," used in our Statute, relative to this crime, mean a greater degree of force violence or personal abuse than is ordinarily used, or than is necessary to accomplish the robbery.

Second? Larceny from one's House. Though the offense of Larceny from one's house is always ~~is always~~ regarded as more aggravated than simple Larceny, yet at common law it is not distinguished from that crime in its general nature or punishment, the degree of punishment however the nature might differ. 1 How 151. 4 B.C. 239.

By certain English Statutes the benefit of clergy, is in most cases taken from this crime: in Connecticut as at common law it is not distinguished from simple Larceny. 18 Stat. 31. 1 How 38.

Though Larceny from the house is not distinguished from simple Larceny, yet when one in the night breaks into the house of another and commits theft, we have already shown that he is guilty of a different & more aggravated offense called Burglary.

Forgery.

Forgery is, at common law the fraudulent making or altering of a writing to the prejudice of another's right. 1 How 335. 219. 2 B.C. 366. 4 B.C. 242.

This offense by way of eminence is in the books frequently called the crimen falsi: it is however only a species of that crime.

What may be the subject of Forgery?

It is agreed that deeds or other authentic writings, of a public nature, deeds, &c. is said wills, but this is questioned, may be the subjects of Forgery at common law. 1 How 338. 1 Holl 65-76. Strange 69. Ray, 81.

But however it may be at common law it is settled by Stat. 2 Geo 2 that wills may be the subject of forgery; In Connecticut, also a Statute on this subject enumerates wills among other instruments that may be forged & concludes with the sweeping clause of "all other Writings." 1 How 110 or 210.

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According to a great number of opinions & authorities the making of any private writing, inferior to deeds, could not be forgery at Common Law, and according to some opinions no offence at all: But the latter opinion is that although not Forgery, it is an offence punishable at Com. Law. *1 Hawk. 357. 3 Inst. 205. 1 Sid. 16. 185. 451. Cro. El. 755.*

Still it is held in *Black. 114*, that the fraudulent making or altering of any writing to the prejudice of another's right, is forgery at Com. Law. *1 Hawk. 357. 1461. 757. 1 Brown 749.*

However the rule may have been at Common Law, by various English Statutes almost every species of Writing is made the subject of Forgery, & since the enacting of these Statutes it has been held in *Kings Bench*, that the fraudulent making ^{the} a Bill of Exchange is forgery, the bill being only voidable. *1 Hawk. 331. 786. 247. 2 Steph. 606.*

Now that is supposed to be more comprehensive than all the English Statutes on this subject, because after enumerating many such ^{outgoing} species of Forgery, it is added in a sweeping clause that the falsely making of any other writing to the prejudice of another's right is Forgery, & of course under this Statute the fraudulent making or altering of any writing to the prejudice of another's right is Forgery. *Stat. Com. 297.*

General Nature of Forgery.

Not only the actual making of another's name to a false writing, or the fraudulently altering to the prejudice of another's right of an instrument already executed is forgery, but also many other things. viz. Forgiveness under false Libels with a fraudulent intent: But *Mr. G. says* opinion it would not be forgery, in such case unless the bills were finally executed. *1 Hawk. 336. 1 Hawk. 757. 758. 170. 1 Com. 129. 288. 5.*

If an officer in the name of another is taken who is at the bottom

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of a letter, write a false and fraudulent instrument over it, he is guilty of Forgery. Moss. 619. 1 How. 336. 5 Ch. 62. 86. 12th 493-6. 38th 171.

So if one fraudulently alter a deed in a material part, he is guilty of Forgery. It is however said by Coke, not to be Forgery, because the alteration is not made in the name of any other than the true signer, & neither the seal nor name is counterfeited. But in an opinion in Coke is evidently false. I would apply with equal force to the false and fraudulent alteration of any other instrument where the seal or name was counterfeited. Moss. 619. 1 How. 336. 3 Ch. 169.

If a Receipt is fraudulently written upon the back of a Bill of Exchange or Order, it is Forgery, even at Common Law. 1st May, 1861. 2 How. 210. note
One may be guilty of Forgery by making & executing a deed in his own name as where he antedates a deed to B with the fraudulent intent to defeat a former one to A. Moss. 638. 759. 4 Ch. 109. 1 How. 336. 3 Ch. 190-238.

Where one writes and executes a Deed or other instrument in the name of another in his presence, & by his directions, or even out of his presence but pursuant to previous authority, he is not guilty of Forgery, it being neither fraudulent nor to the injury of any person, such instrument being valid nam. qui facit per alium facit per se. 1 How. 337.

It is of the essence of Forgery that the making or alteration of the instrument be fraudulent, therefore for an Oblige to alter provide with pen is not Forgery, because no fraudulent intent can be shown. How. 21. Moss. 638. 3 Ch. 375. 1 How. 337.

But such alteration like all other immaterial alterations by the Oblige avoids the instrument. Nb. 26. Cap. 24.

If it is said if any immaterial alteration be fraudulently made with a view to gain a benefit, or to injure another, it is Forgery, as to lessen the sum of a stamped note, so as to make it payable or having been written to ^{a note} ~~be~~ ^{and} lessen its value, or make erasures ⁱⁿ it by means whereof it is ⁱⁿ void.

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in the hands of the Assignee. 11 Mod. 332. 2 Bos. 562.

It is required, that a man non est, that with a fraudulent intent cannot amount to forgery, - therefore if a scrivener neglect to insert a signature, he is not guilty of forgery unless in consequence of that omission the request of another is materially altered, when it may be forgery. See 10. 11 Mod. 332. 1 Bos. 762.

It is not necessary that, in order to constitute forgery, any other person should be actually injured; it is sufficient if the instrument being forged is calculated to injure, or may be so to the prejudice of another. 11 Mod. 332. 1 Bos. 762. 10. 11 Mod. 332. 1 Bos. 762.

It is not necessary to constitute forgery, that the fraudulent instrument should be published, it is forgery even though it be kept under lock & key in the maker's desk. 1 Bos. 1461-62.

Punishment of Forgery.

Forgery is punishable at Common Law by imprisonment or Billings, but it is not a capital offence, & it therefore not a crime at Common Law; but by a statute of the 1st Geo. 4. it is now punishable with death. (See En. 2.) 4 Bos. 272. 1 Bos. 762.

In England, if the offender is a man, he is punished by imprisonment in the House of Correction, or in a common Gaol; & a woman, she is punished by imprisonment in the House of Correction, or in a common Gaol, or by the same punishment as a man. It is not necessary for the same length of time as a man, & in the House of Correction, it is also punishable by imprisonment. 1 Bos. 762.

Under our Statute nothing is Forgery, unless done to pervert "Equity & Justice" this expression however it is ^{supposed} does not vary our Law from the Common Law. 1 Bos. 762.

The word "other" is not used in our Statute, but the necessity of it is supplied by the term "false writing". 1 Bos. 762.

Falsification

The mode of charging the offence in Court when it consists in an alteration, is by alleging that the party made a false writing. In Court the injured party, in case of forgery, is entitled to double damages. Widd.

In an indictment for forgery it is necessary to set forth the false nature of the instrument in which it is made, & the least variation in the matter is sufficient to vitiate. The rule is that it is not a fatal variance, if it does not decide the issue, in which case it is not a fatal variance. 12 Cr. 224.
12 Cr. 224-225. 12 Cr. 224. 12 Cr. 224. 12 Cr. 224. 12 Cr. 224.

The indictment must always set forth that the false instrument was made by the party, which it was intended to be admitted to represent, & if it is shown that it was intended to be used for a different purpose the indictment will not be supported. 12 Cr. 224. 12 Cr. 224. 12 Cr. 224.

It is sufficient in a indictment to allege the instrument was made, which is of the nature of the crime, & the particular manner in which it was made need not be stated, unless it is shown in the proof. 12 Cr. 224.

A false writing in the name of a person is not a crime, unless it is shown that it was intended to be used for a different purpose. 12 Cr. 224. 12 Cr. 224.

Perjury

Perjury is the offence of swearing wilfully, absolutely & falsely in a matter material to the issue or point in question, under an oath lawfully administered in some judicial proceeding. 7 Cr. 137. 137. 3 Cr. 137. 14 Cr. 137.

It is requisite according to the definition, that the swearing be wilful, that is intentional & attended with some deliberation. 14 Cr. 137. 14 Cr. 137.
14 Cr. 137. 14 Cr. 137. 14 Cr. 137.

It is immaterial whether the Court in which the false testimony is given is a Court of Record or not. In England all Courts & common law courts are Courts of Record. In Connecticut all Courts of Common Law are Courts of Record. 14 Cr. 137. 14 Cr. 137.
14 Cr. 137. 14 Cr. 137. 14 Cr. 137.

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swearing of the certificate is merely from an apprehension of exposure, still the rule is the same. 1 H. 44 413. 2 H. 6. 516. 2 M. Hall 777.

It is not material whether the circumstances sworn to be true in point of fact is not if he who swears does not actually know it to be so, but supposes it to be so, designing falsely. Palm - 294. 3 M. 222. 1 H. 322. 6 M. 657.

It would seem from the definition that the fact must be sworn to positively to constitute the crime of Perjury; but it has been decided that if a Witness in an indirect and unintentional manner swear to a fact which he knows not to be true, he is guilty of Perjury. From this it appears that the word "absolutely" in the definition ought to be struck out but the ancient law was that it must have been testified positively or it did not convict the Witness. 1 H. 323, 3 A. 815. 3 S. 166. Leach 301. 1 M. Hall 262. Cro. 227. 3 S. 166. 6 M. 655.

Agreeable to the definition the false testimony must be of a material fact, therefore any idle or impertinent testimony cannot be the subject of Perjury. Yet if the false testimony, though circumstantial & not strictly applying to the issue tends to aggravate or extenuate the damage, it is perjury; and the rule is the same where the false testimony, though immaterial, tends to convince the jury of the truth of that which is material. Id. 274. M. 33. 2 L. Ray 258-9. Cro. Car. 500. 1 H. 528. 12 Co. 101. Cro. Jac. 212. Strac. 413. Ther. 382. 1 H. 328. 324. 2 L. Ray 258. 2 Holt 363-4.

It need not appear on the trial in order to subject the witness; how far or in what degree the false evidence was immaterial, it is sufficient that it is proved to have been in some degree material, or that it in some measure conduces to substantiate the fact in issue, tho' it was circumstantially relevant only, and therefore it need not appear that it was decisive of the fact in question. 2 L. Ray 255-887. 1 H. 226. Id. 305.

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The onus probandi in prosecutions for perjury is always with the prosecution to show the materiality of the false testimony: & indeed to make some point in the case. It must always be shown that there was a trial at the time the prisoner is alleged to have committed the crime. This can be done only by the Record but as it is not necessary to go into the particulars of the former case or trial the Testes is sufficient. The cause in which the perjury was committed must be set forth in the Indictment - the nature of the action - the name of the parties - the Court - the place - & the time when & where it was held, must all be stated. 5th 170. 1st 170. 250. 2d 170. 468-633.

It is not necessary that the false testimony should have been believed by the jury or have done any person an injury. The crime does not derive its turpitude from the injury to the individual, but from the abuse of public justice and confidence. 2 Lev. 211. 3rd 230. 3rd 345. 845. 848.

It has been decided in England that the word "Wilfully" need not be used in the Indictment although it is included in the definition. But that a substitution of other words will supply its place as the words were falsely and maliciously. Leach 69.

It is a rule that to obtain a conviction of perjury there must be at least two witnesses otherwise there will be but Oath against Oath. 10 Mod - 175. 1st 170 - 37. 2d 170. 635. 11th 323.

It is generally true that in prosecutions for other crimes circumstantial evidence will be sufficient to induce a conviction: but in perjury circumstantial evidence and a witness's testimony will not prove it true is inadmissible. 2d 170 - 471.

Perjury from its nature is an offence that cannot be committed accidentally by two or more persons, for two or more cannot be sworn in a prosecution. 1st 170. 845. 121. 170. 474.

But all are not sworn in the same manner, for some that are not

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connected with this rule is often dispensed with. Stat. 157. 1st. Tally St.

In committing all offenders are bailable except such as are Capital, or conspirators in Open Courts. Stat. Gen. 67.

It is a general rule that the Court which has final cognizance of the offence may admit the person charged with its commission to bail. In accordance with the rule in KB &c., it is supposed that the Superior Court in Courts may admit to bail even in Capital cases. But the Courts in the exercise of that power would be governed by the same principles as Kings Bench. 11 Mod. 176. 2 Hyl. 420. 423. Stat. Gen. 67.

The Officer who makes the arrest, common in any case that is criminal, is the bailiff or the Sheriff acts as a bailing Officer, in Eng^t it is by virtue of his judicial authorities. In Conn^t he has no judicial power.

In Conn^t writ is to be presented by the Magistrate who acts as the Officer in England & the Sheriff is bound to accept it, he acting merely in an executive capacity. Trial in Conn^t, in common cases, where the offence is triable by the Superior Court is taken in the name of the Treasurer of the State. If by the County Court in the name of the County Treasurer -- by a single Minister of the Law in the name of the Treasurer of the State in which the offence is to be tried. --

It is a rule of common Law that if the bailing Officer takes into custody a person charged with an offence & the person charged fails to appear he is liable to be fined. 5 B. 277. 2 Mod. 172. 1 Str. 221.

It is the common practice in Eng^t to require, even small fines in all cases of default & in some cases to require a surety to the justice in the case. These are sureties are not required. 2 Mod. 120. 2 Str. 171 note 11 to 13.

The refusal of bail by a magistrate when it ought to be allowed, or the admission to bail in cases not bailable, is a common-law offence & the punishment is by fine and by imprisonment & in the former case the person refused, is entitled to his civil action in

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at the Court Treasury at the trial was held.

When distress is sought against a person they go to the same extent out of which they must have been paid had the prisoner been able to discharge them. And when he is unable to pay debts for which he has been made liable he may be sent out in service to any inhabitant in the State or of the U. S. all his wages are sufficient to pay them, Sec. 9104, or to his being bound to an inhabitant of another State.

But the rule that "one may be taken as a person acquitted of crime only in those courts which can convict the offender" is not in a point of Inquiry on Regulation. Prin. 362. -

Criminal Jurisdiction of Courts in Connecticut

The highest Court in the State has as well as civil jurisdiction in criminal as the Superior Court. This Court has exclusive jurisdiction & cognizance of all cases of crime punishable with death, life & terms, and punishments. It has also exclusive cognizance of all cases of Abolition & all cases of Crimes Prin. 270.

Though the Court has exclusive jurisdiction of the Superior Court in all crimes punishable with life & terms, yet it seems that there are some crimes which are so minor that the Court is unable to be tried, may be considered within this rule.

Case of Transmittal There is but a single Instance in which it can be applied & then by way of illustration, this is in case of a Court of Justice & may be used, several times transmittal Connecticut Prin. 270.

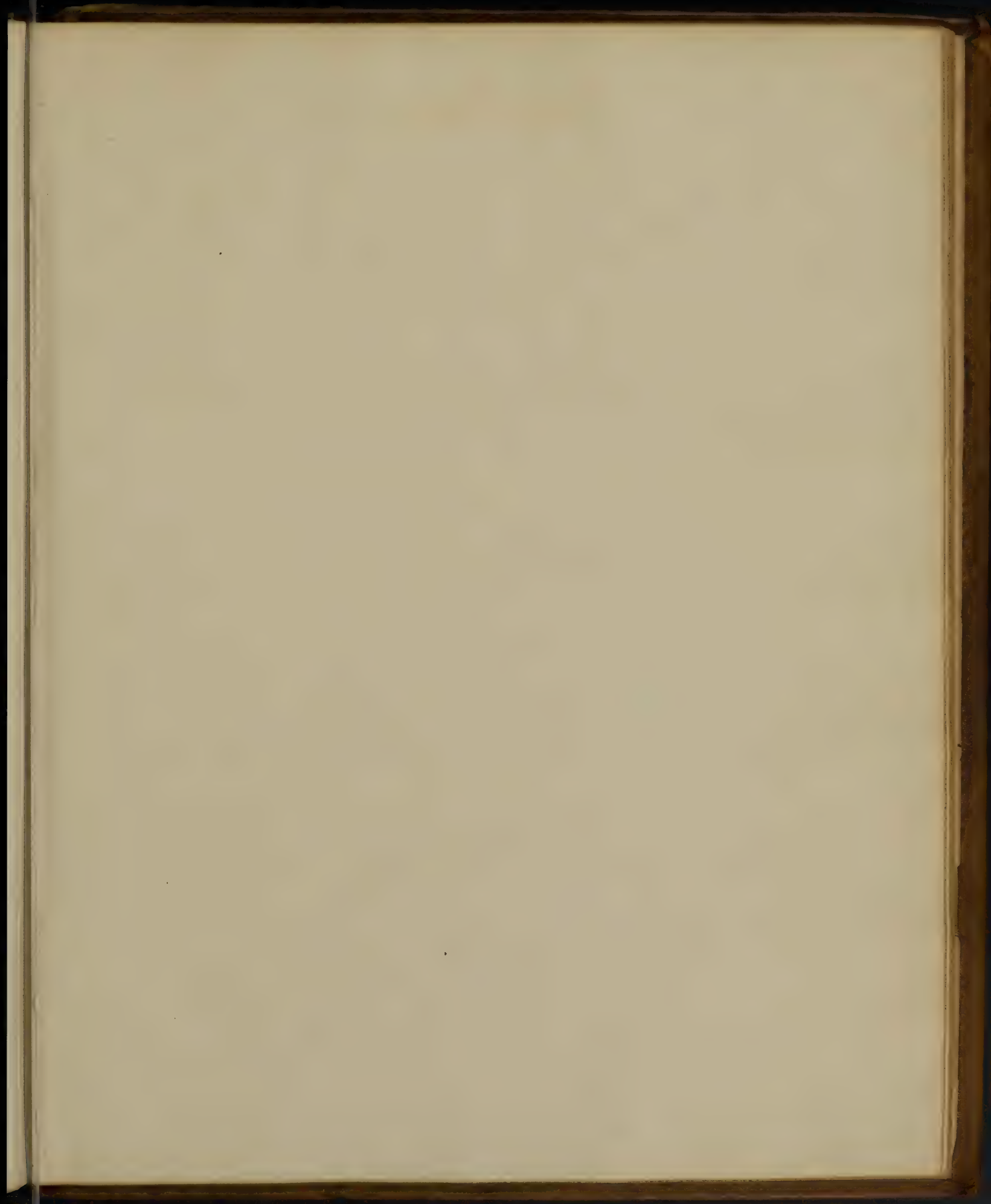
This Court has also exclusive jurisdiction over all cases punishable by imprisonment in the State Prison, but a case occurring where the Court of Common Pleas has jurisdiction, over Prin. 270. the jurisdiction in these cases is concurrent,

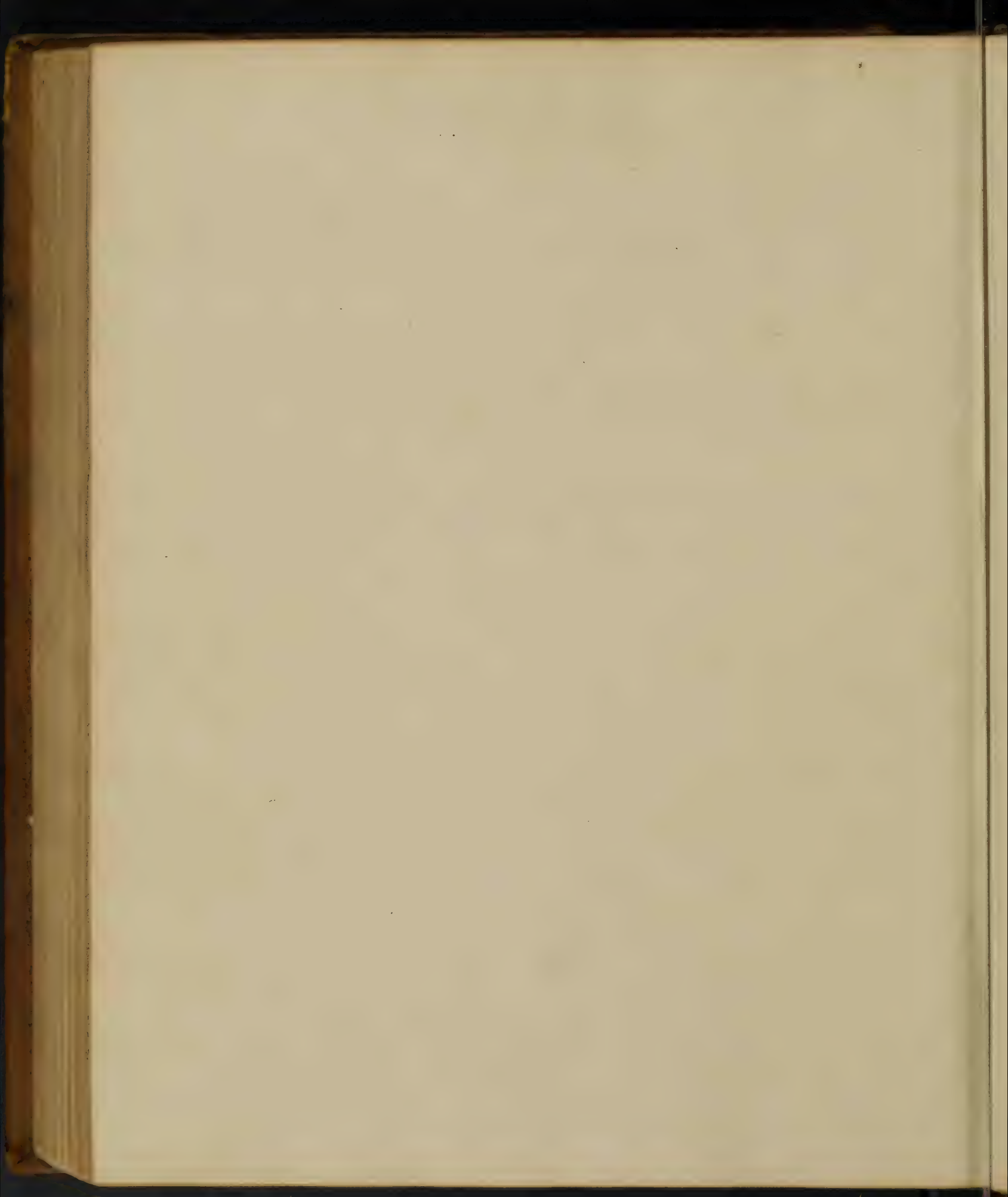
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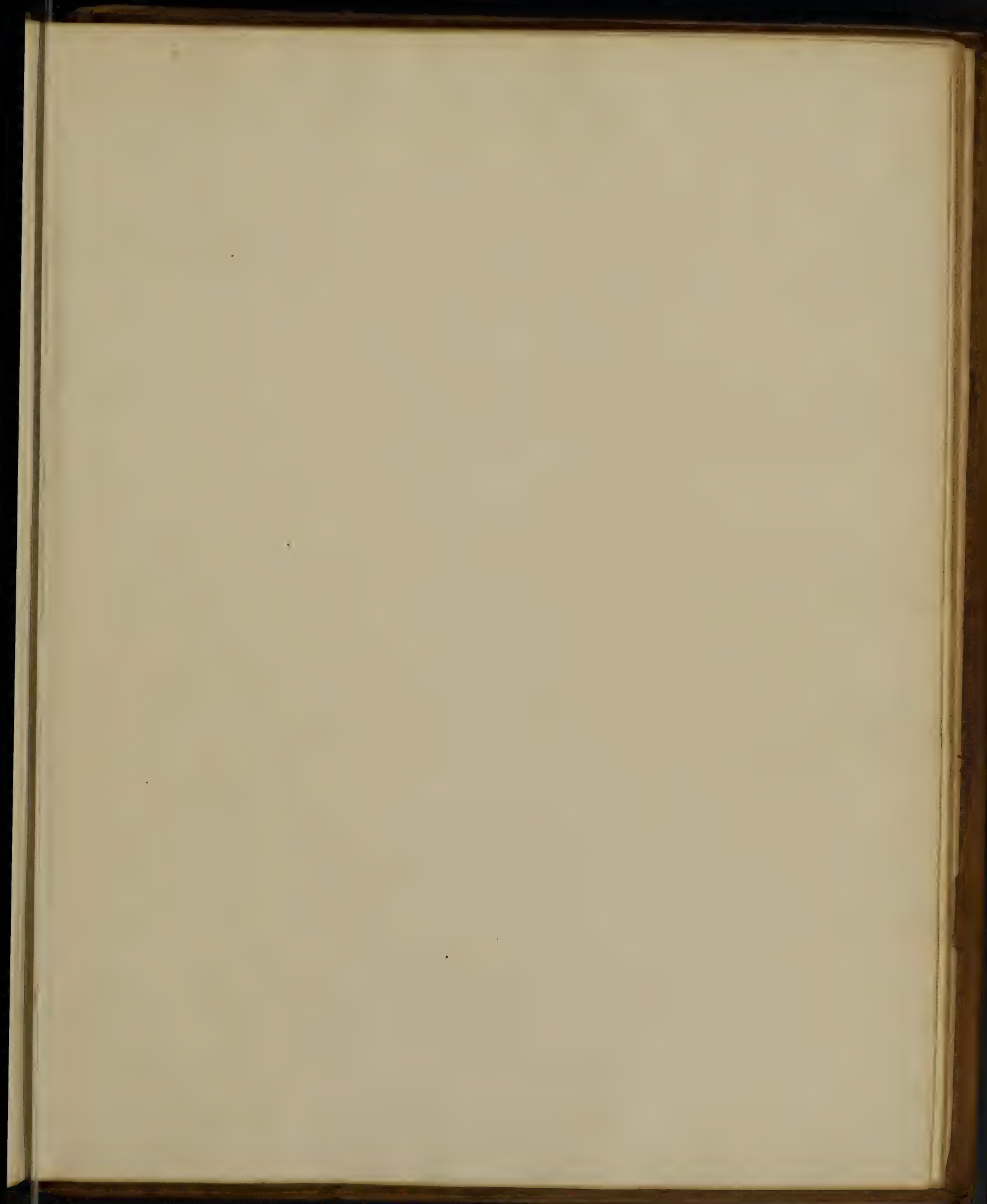
In criminal cases the Jurisdiction is a local, & not confined to the
 town in which he dwells, but extends throughout the County. ^{Since} as to
 civil cases unless there be no person in the town qualified to such may frequent
 (by the act in 1788, ²) to try the cause & then any, & in the county
 set set were, whether or not, than in the ^{most} adjoining town
 may set plea a the cause.

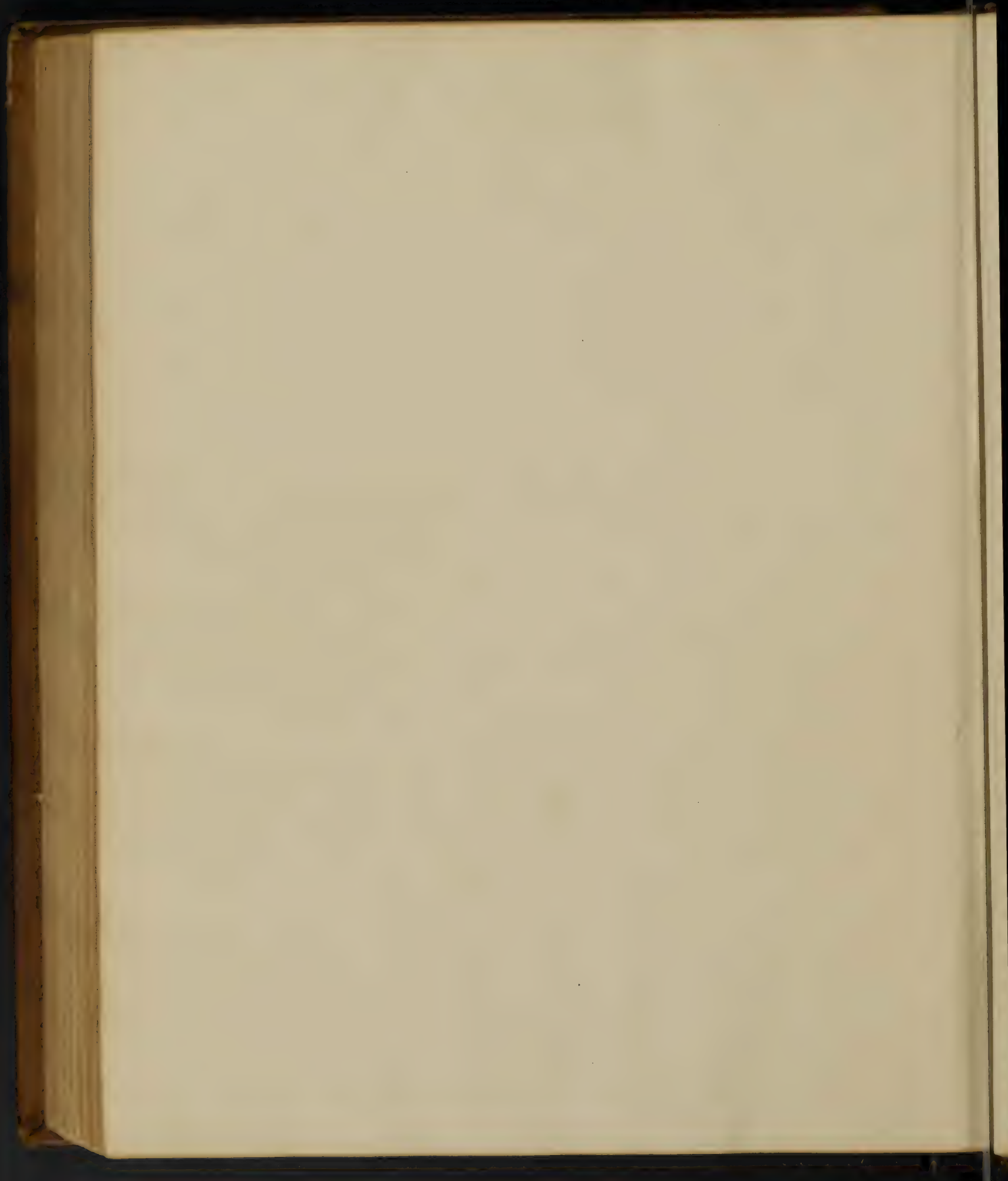
The territorial crimes are local & the murder must be done in
 the same county in which he committed the crime, & said the Lord in Eng,
 July 28. 76. Drum 760.

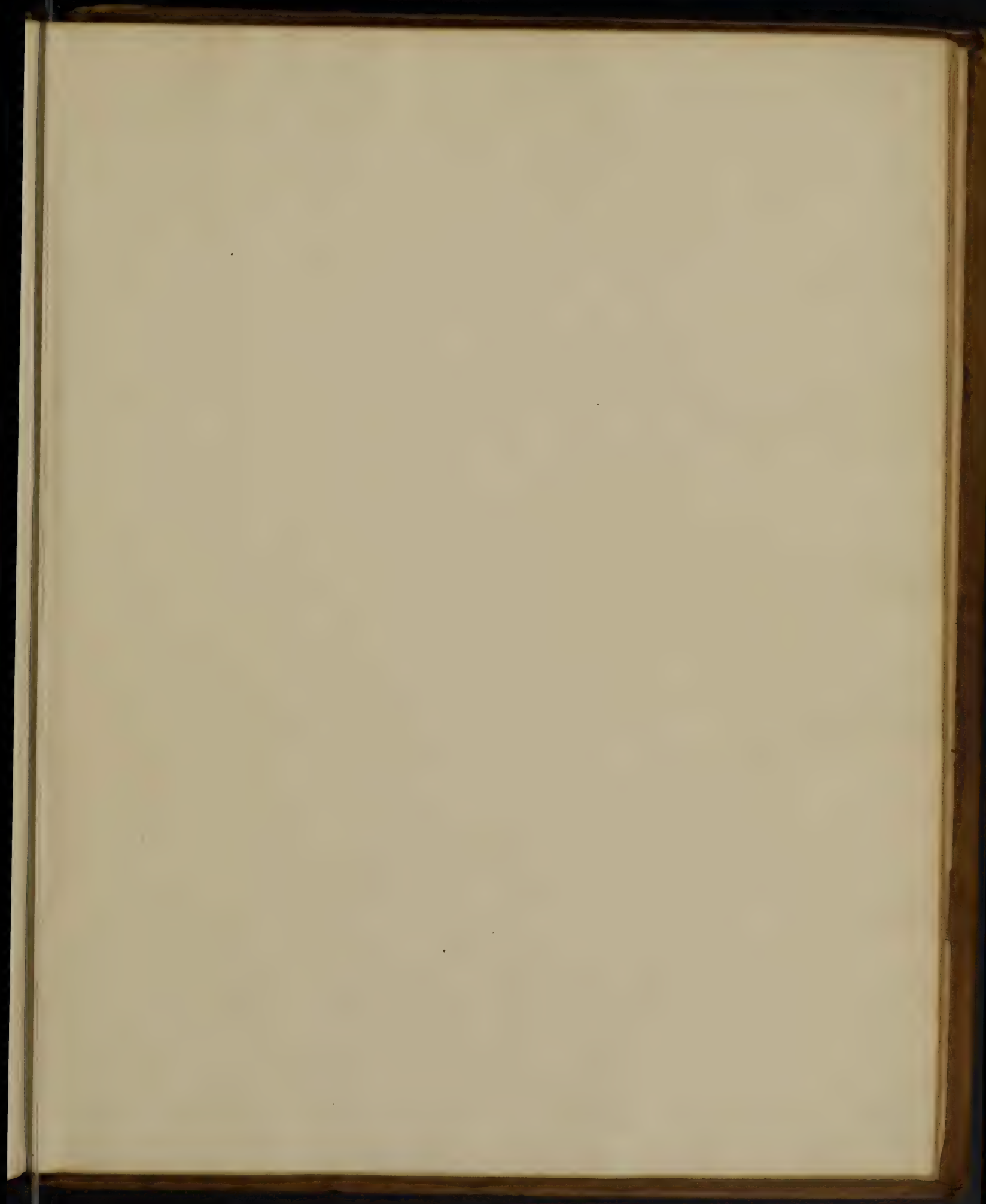
But in quibus actibus & the party approved he may prosecute
 in the county, in which he dwells. Drum 761.

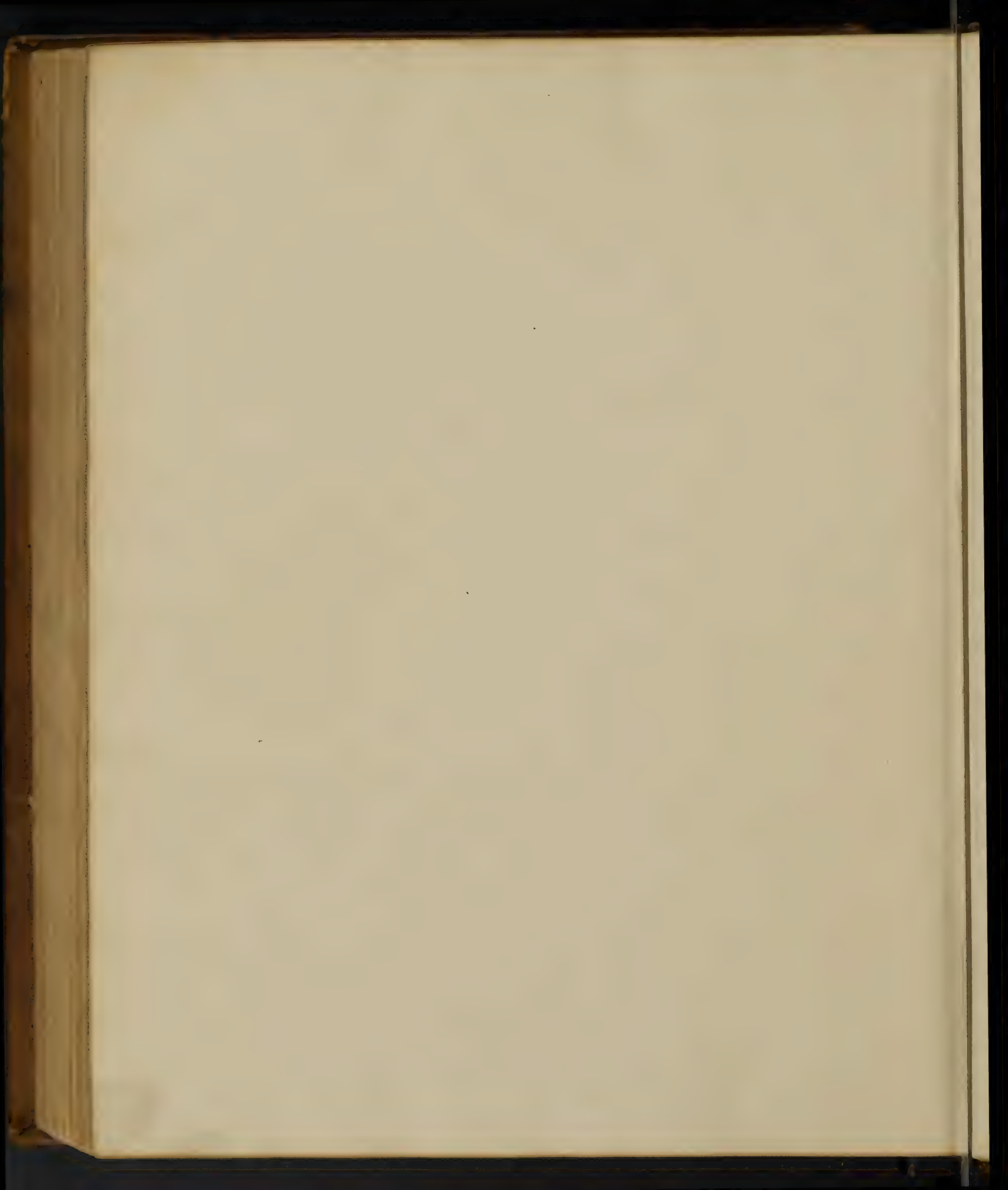


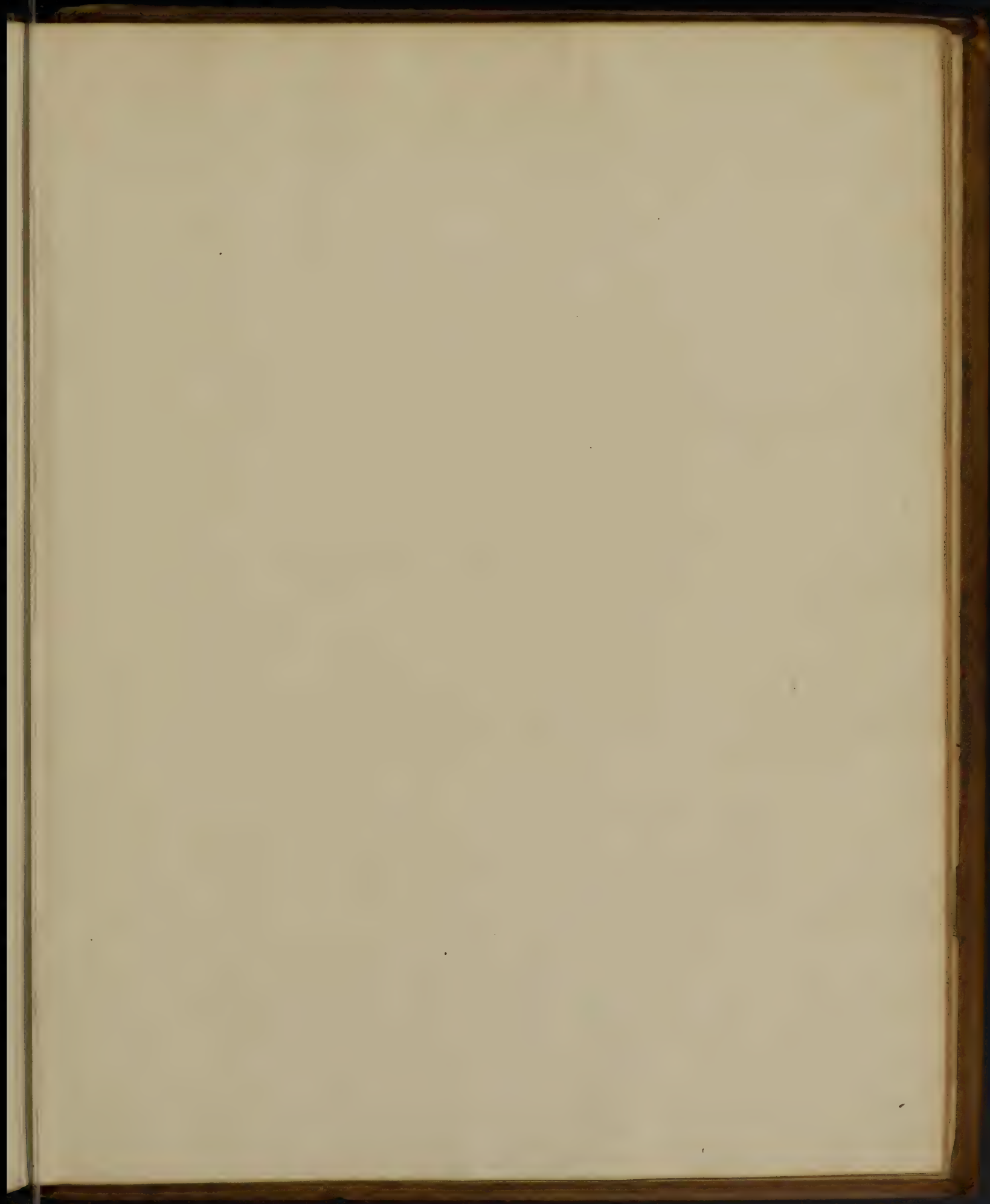


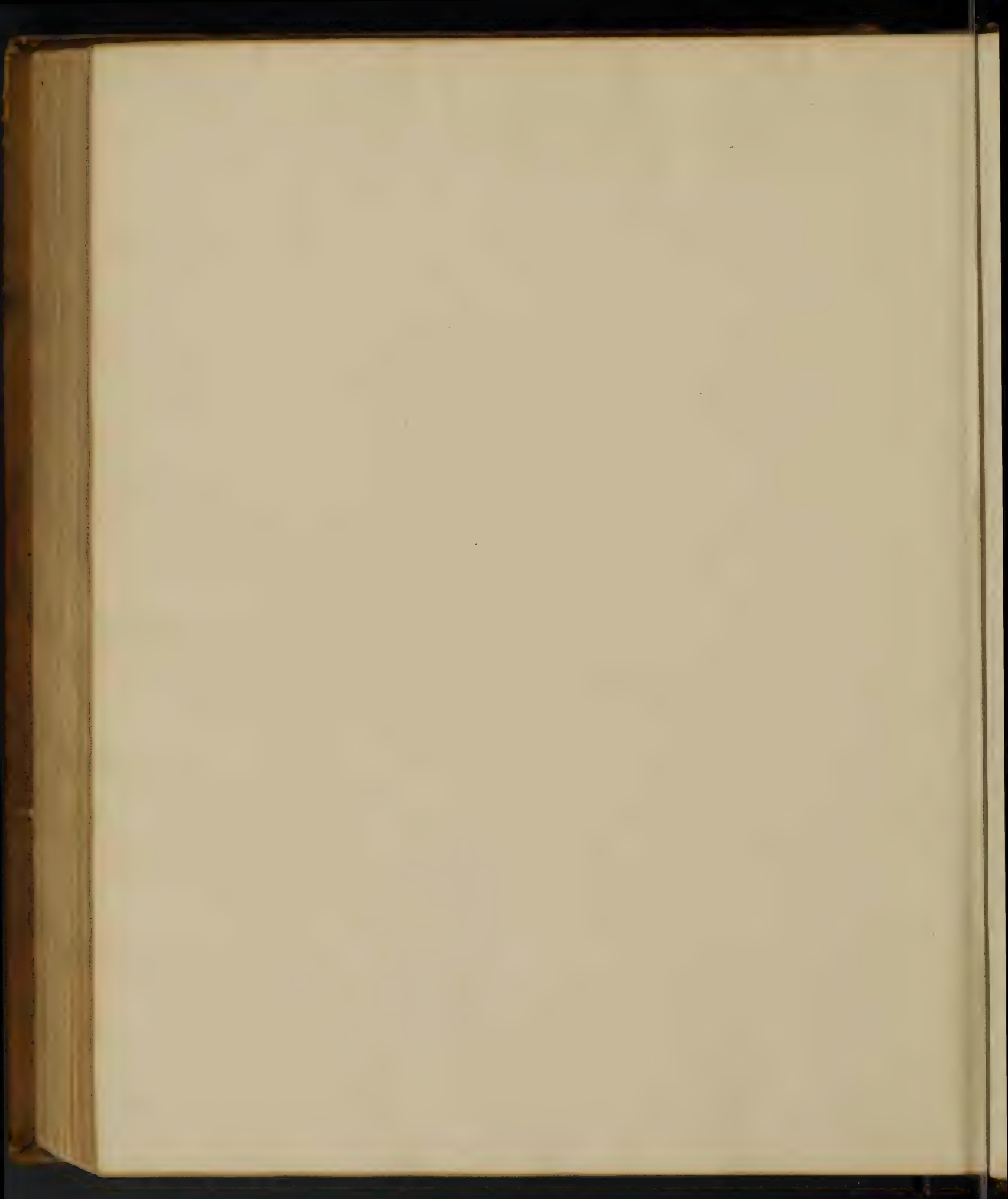


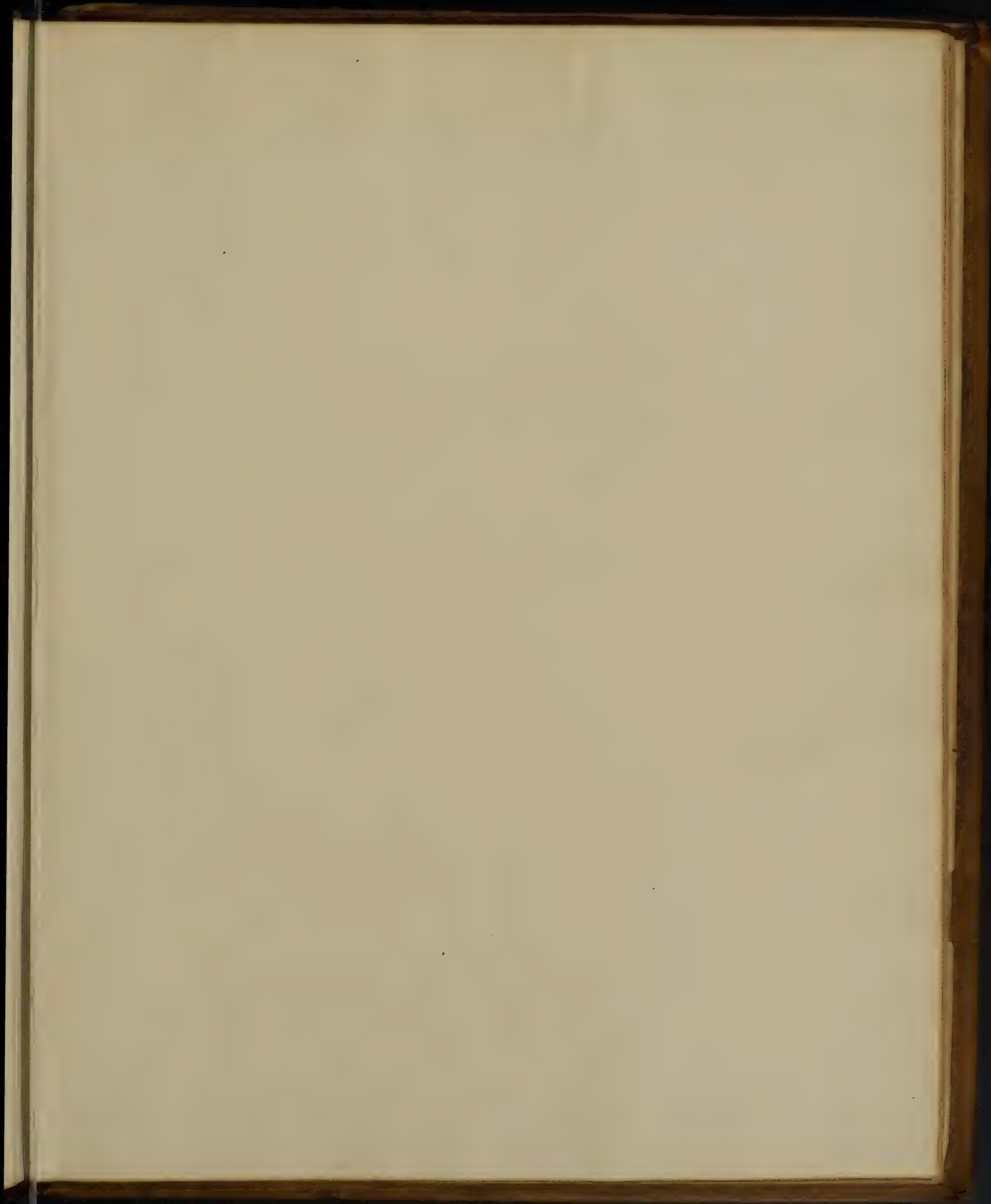


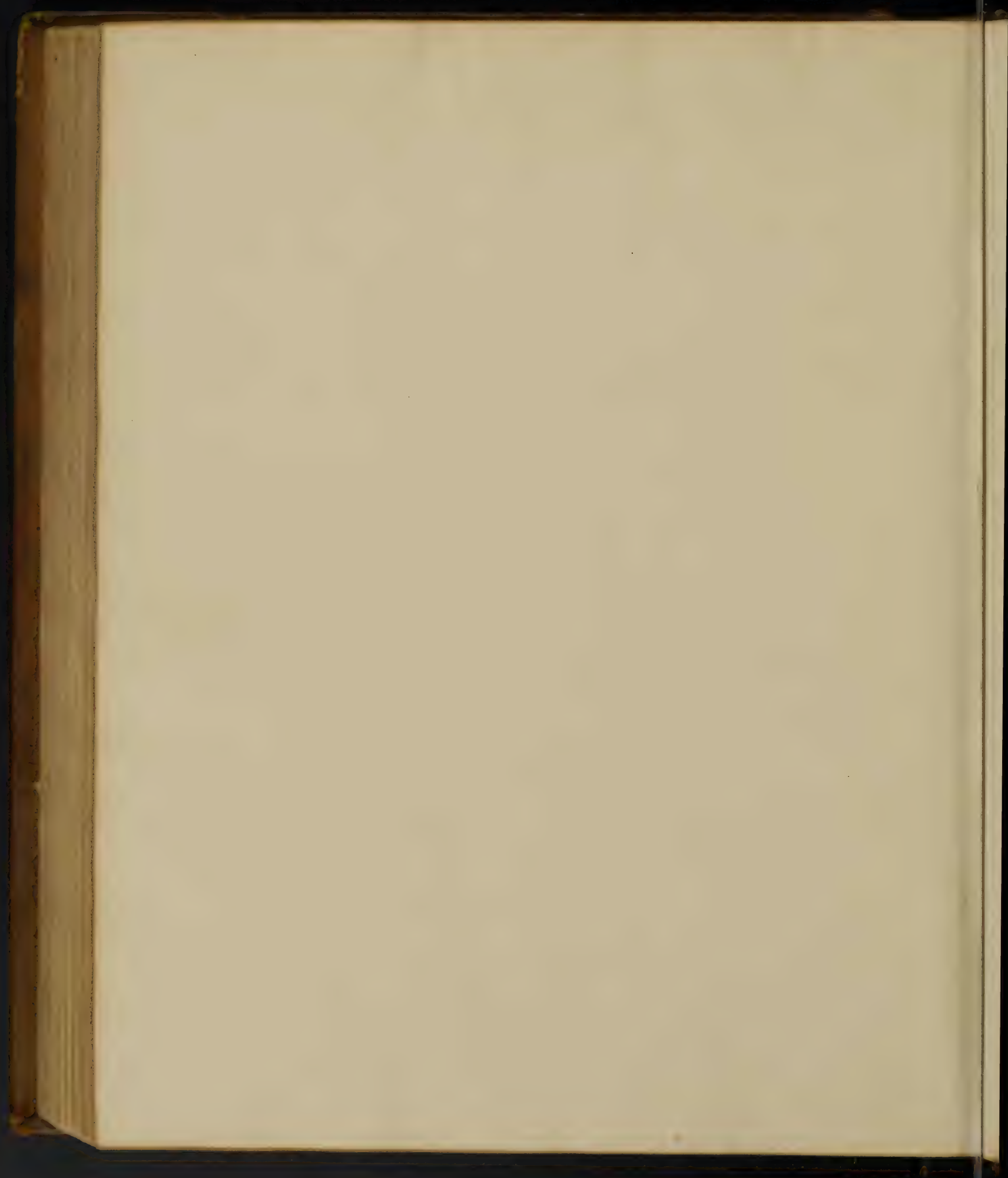


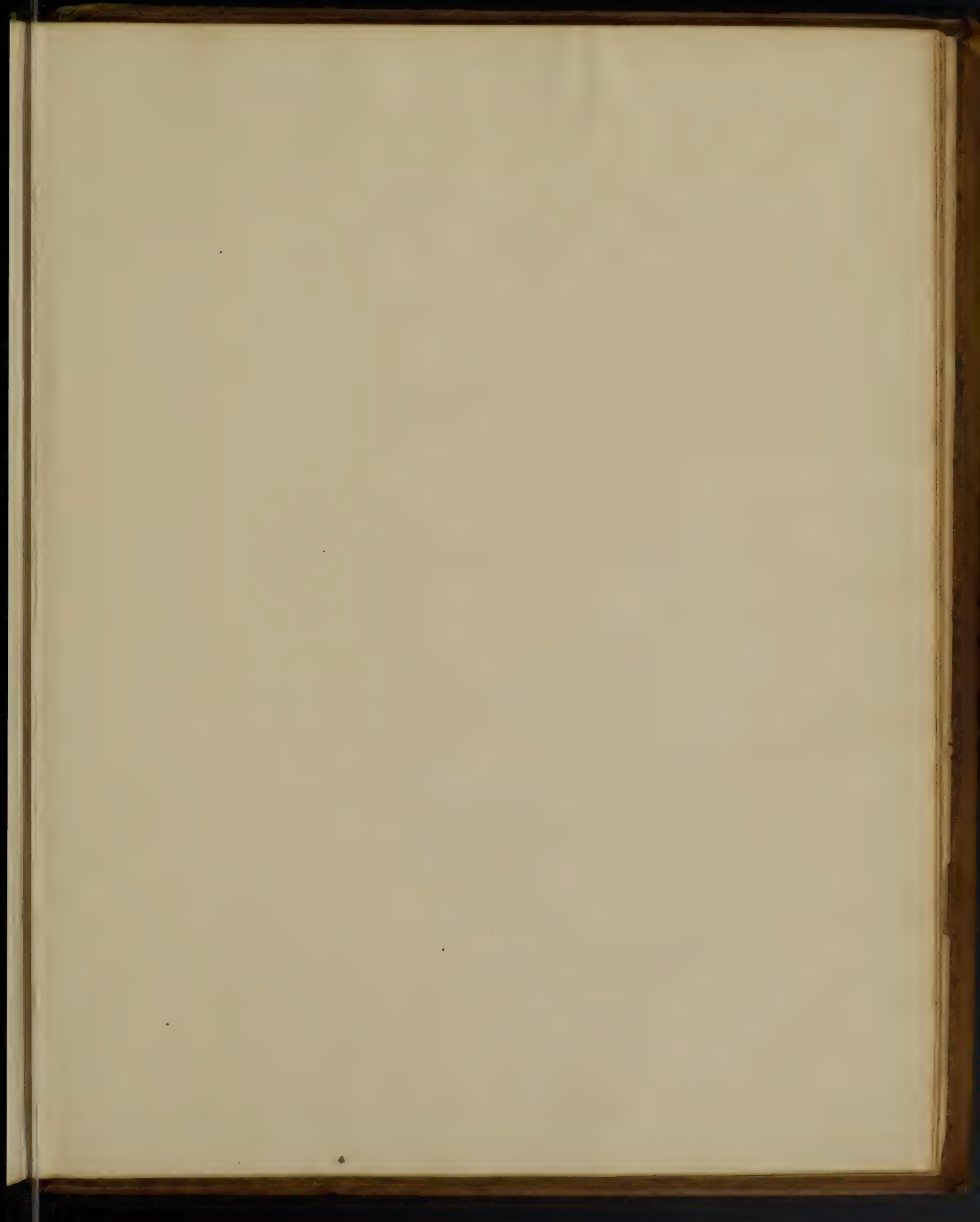


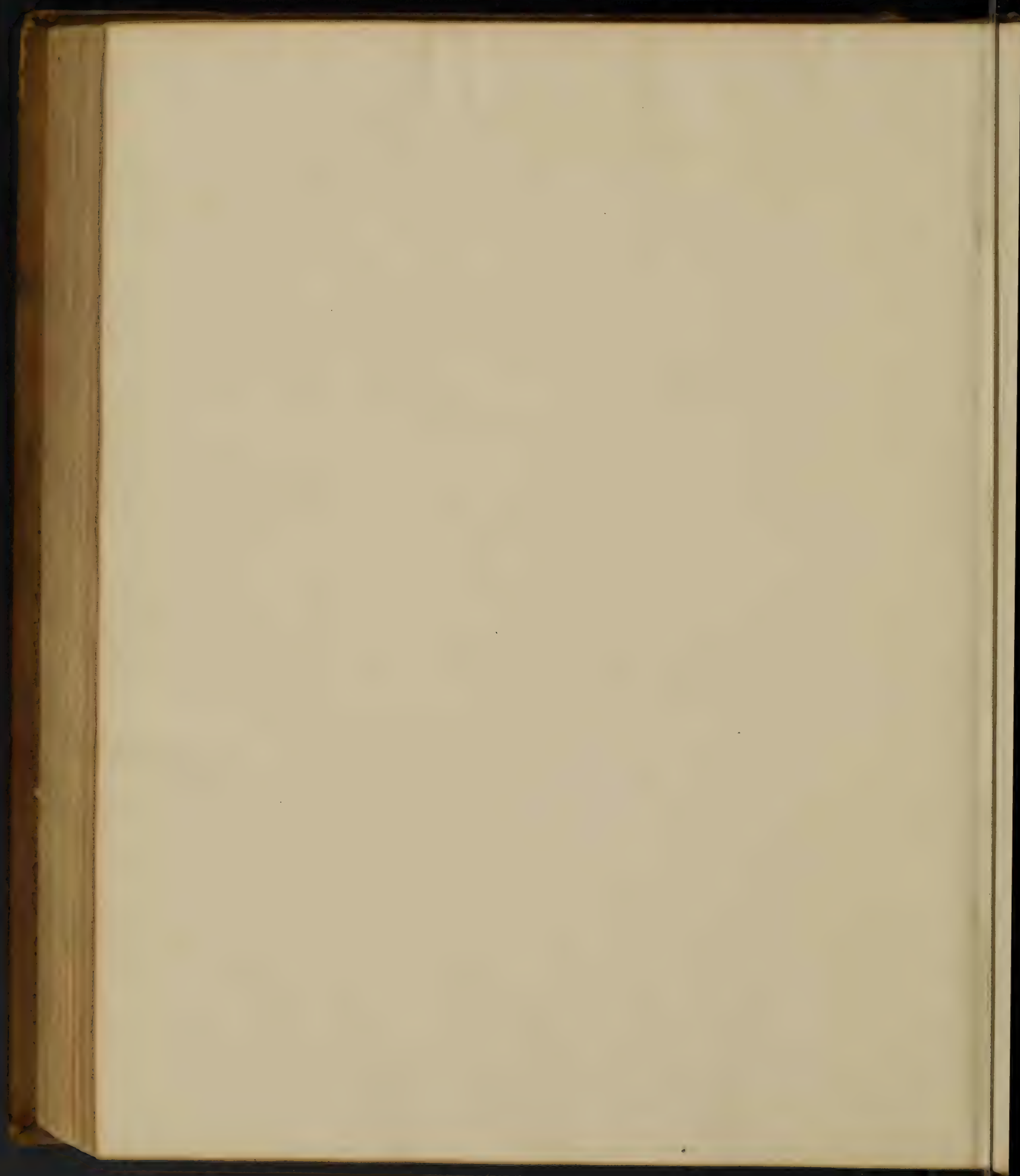


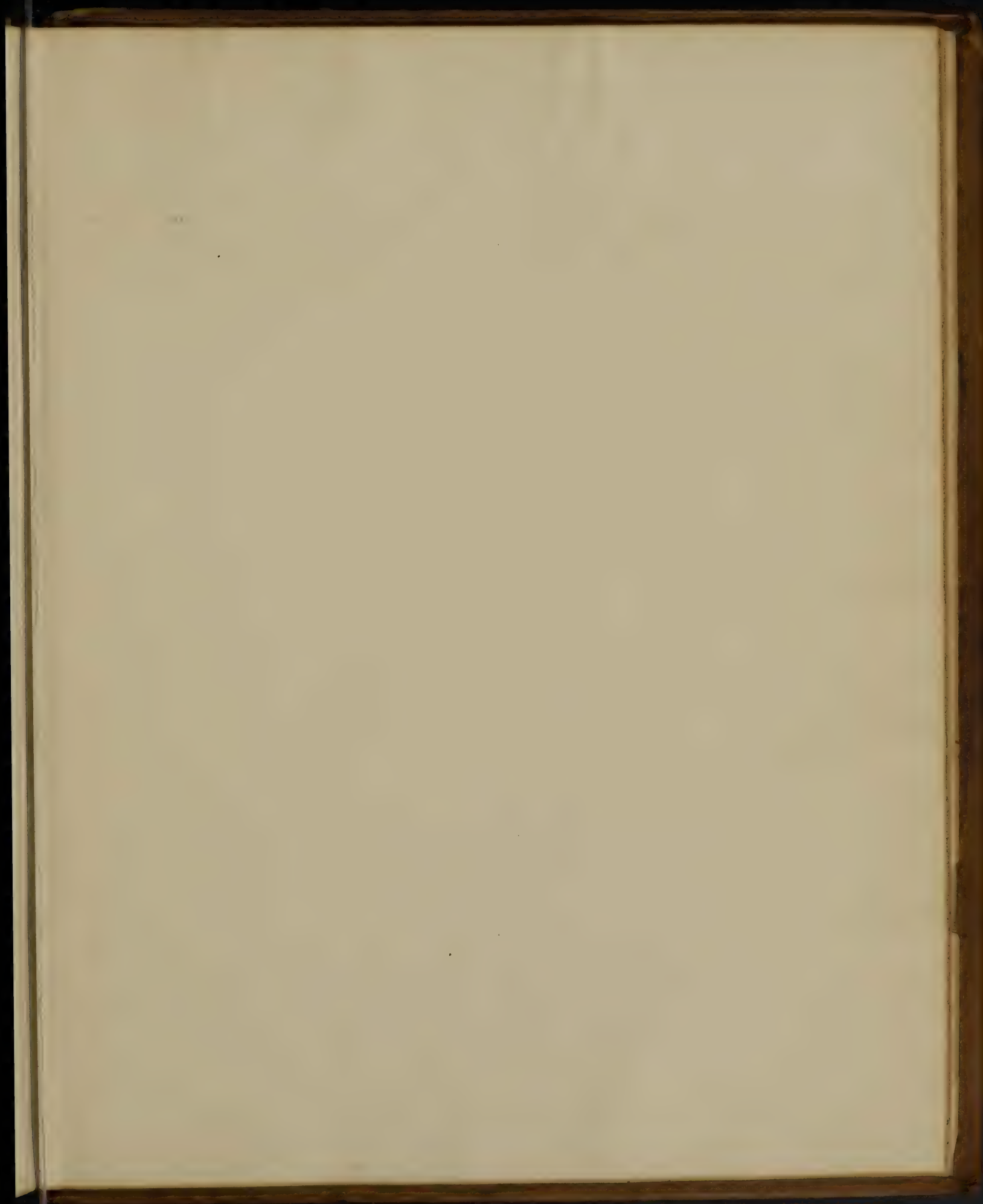


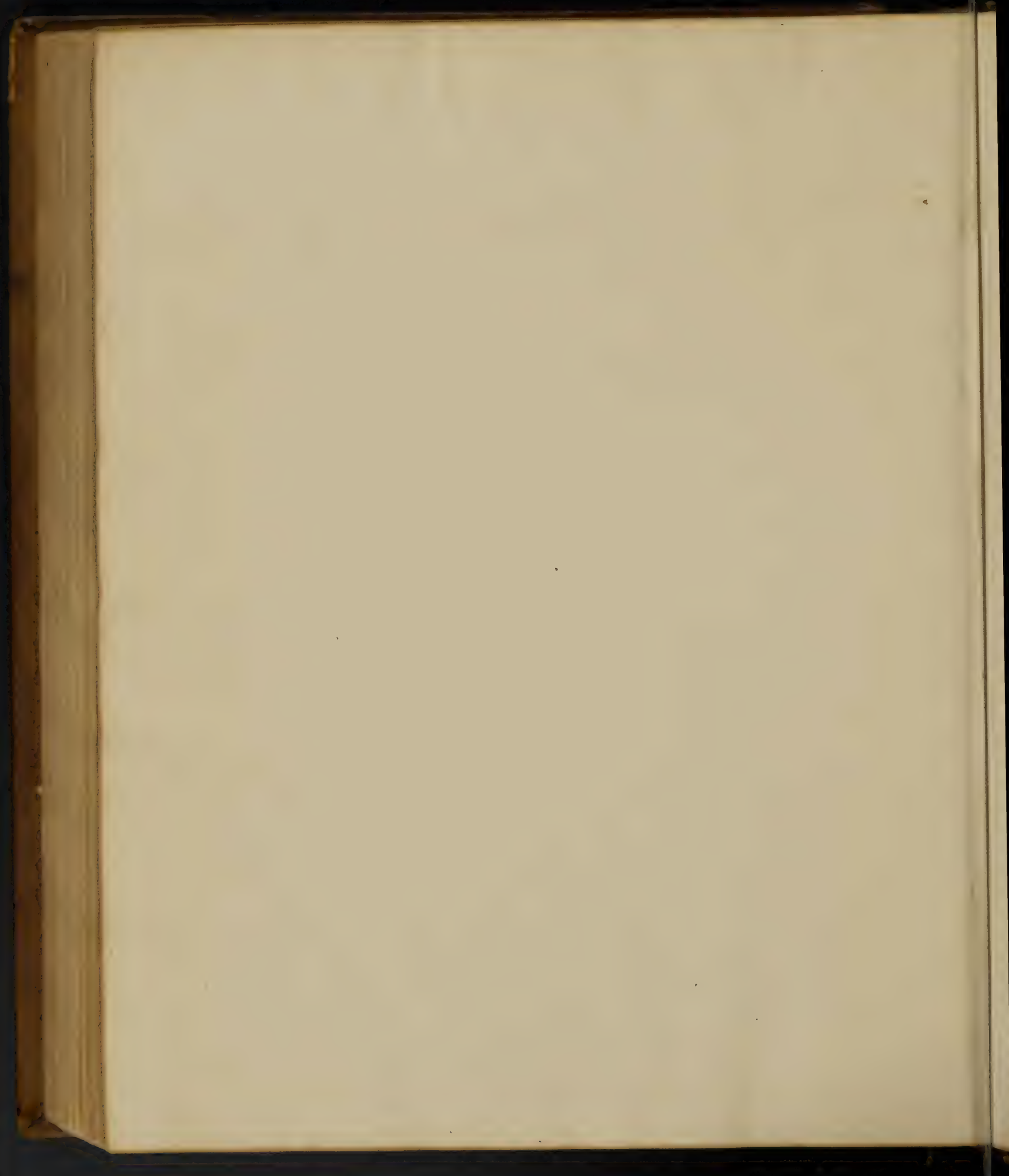


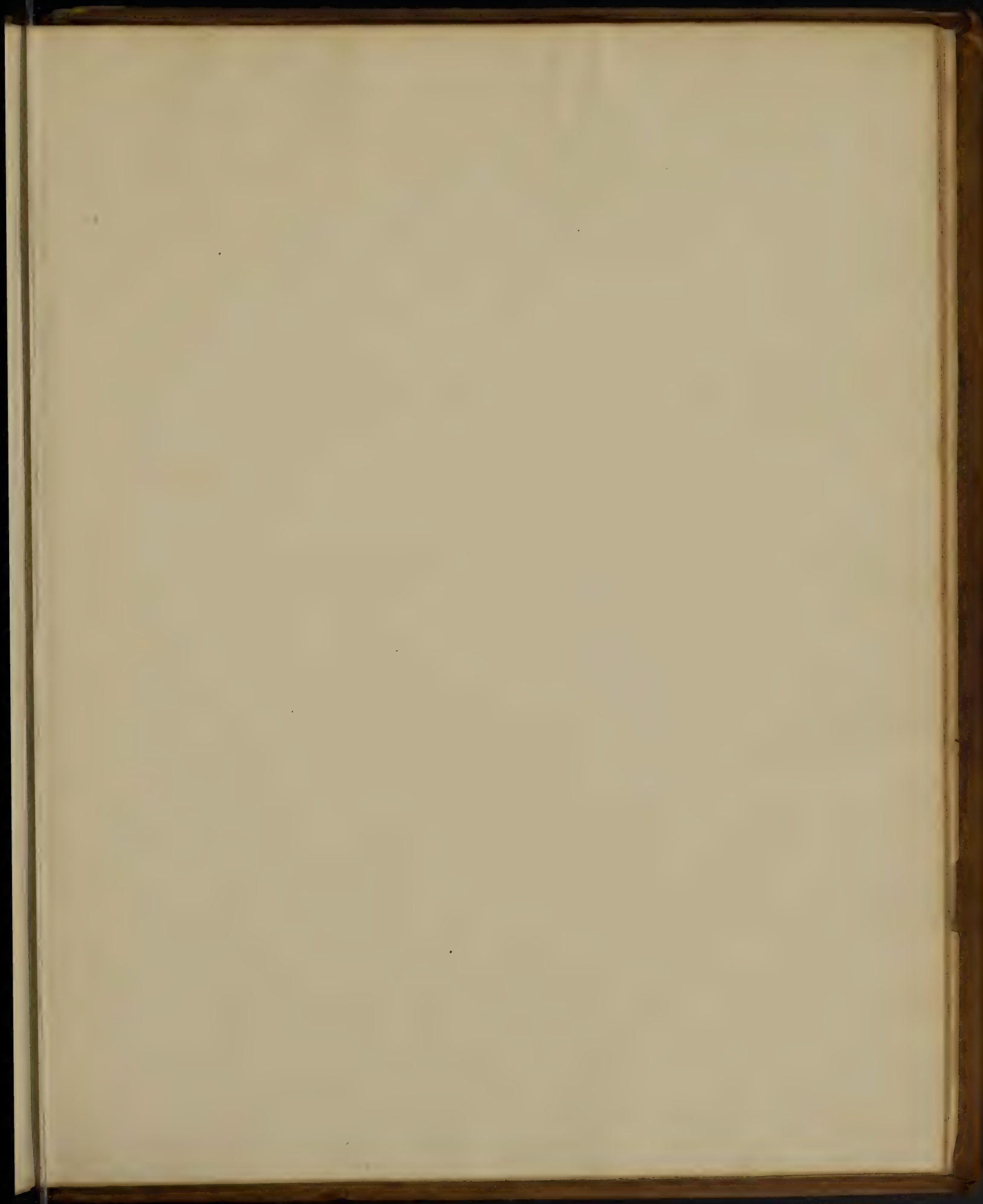


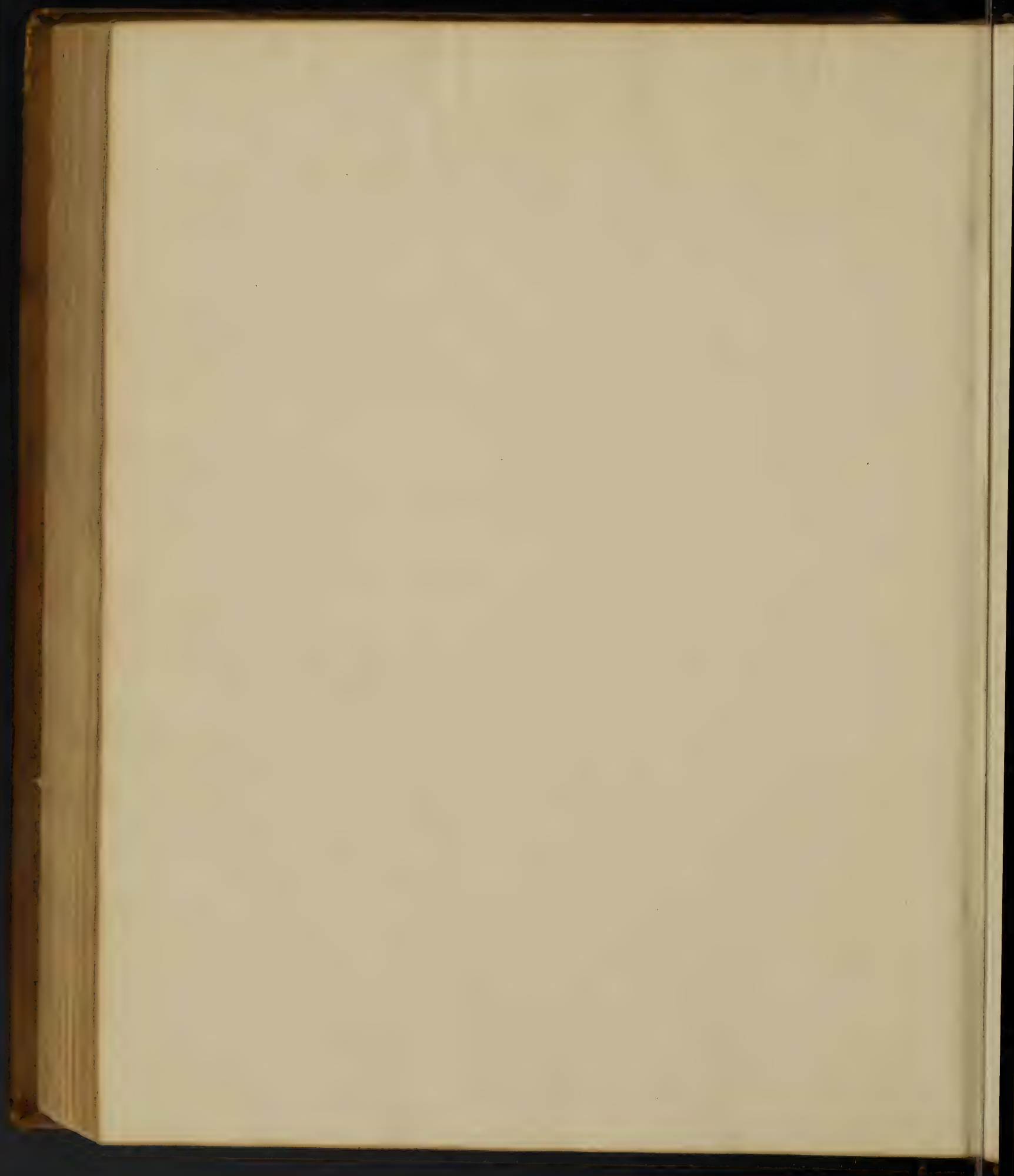


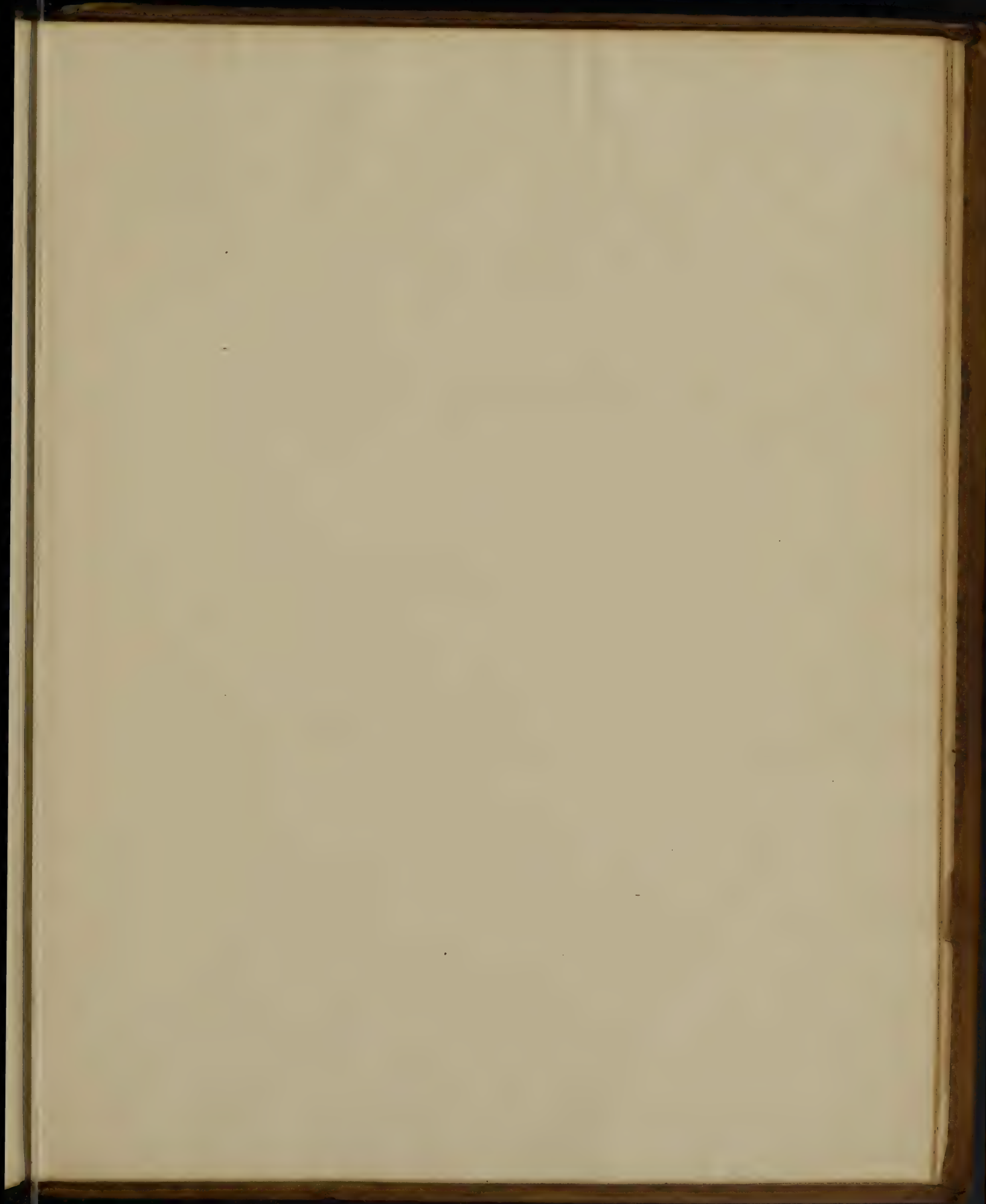


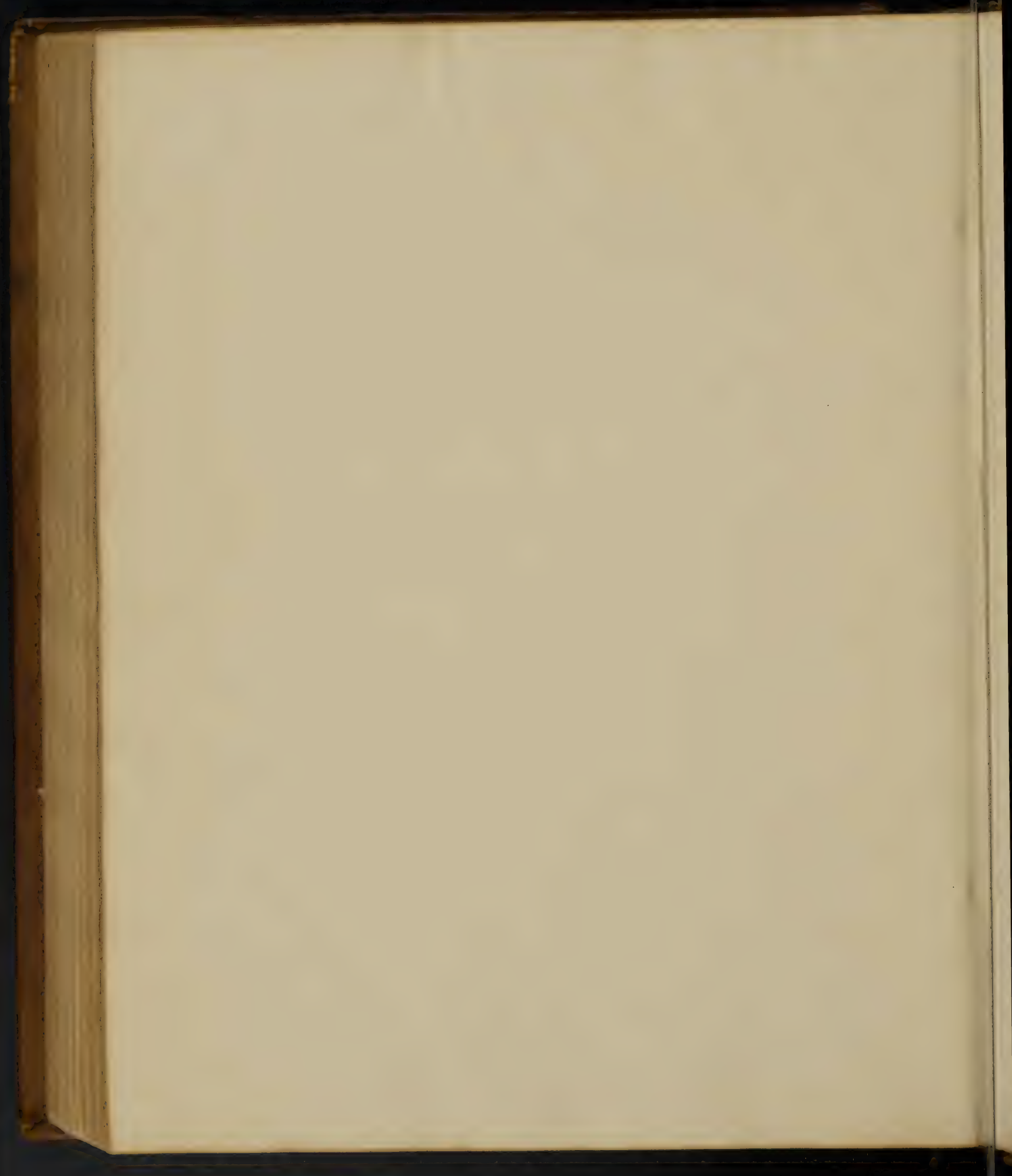


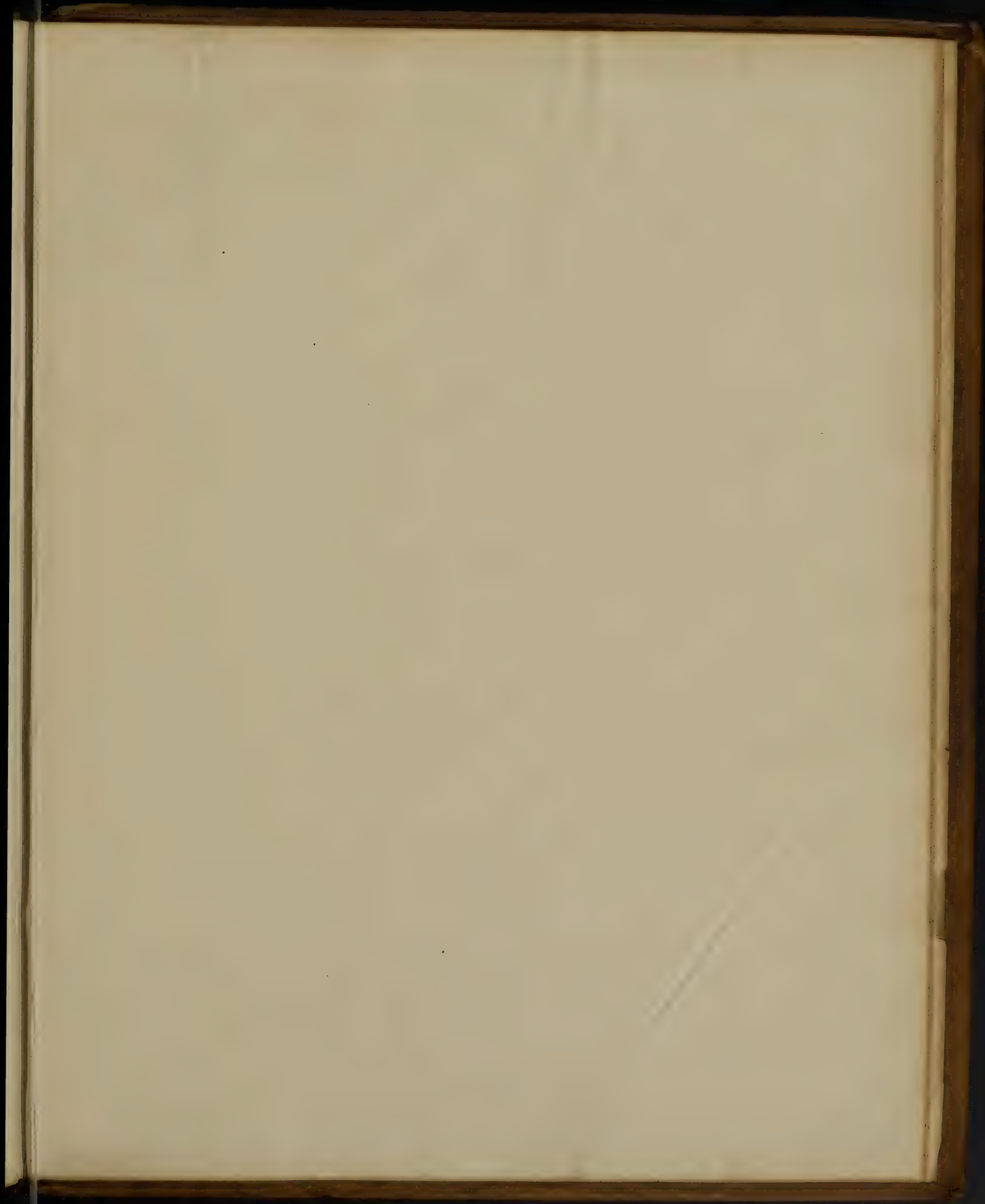


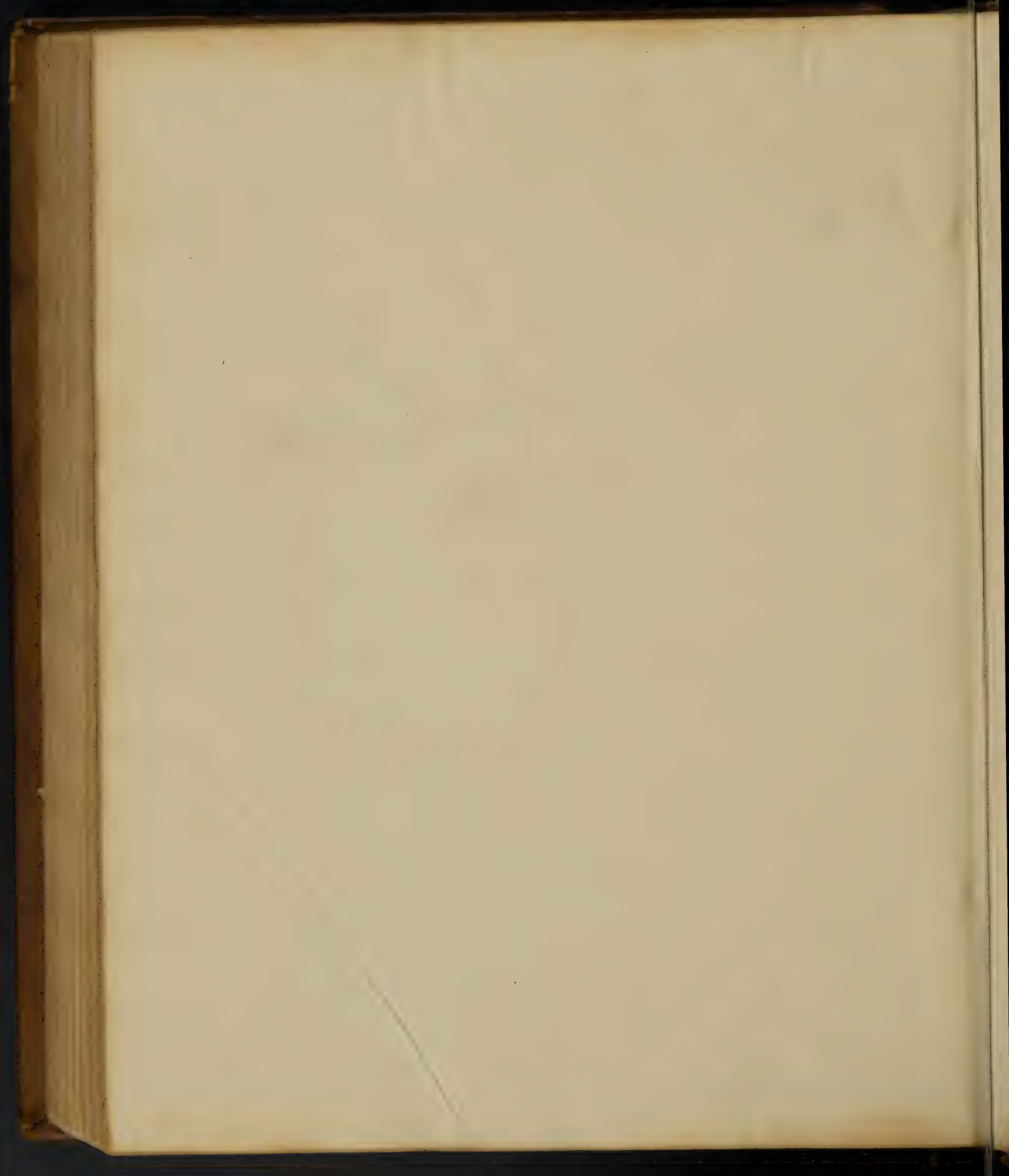


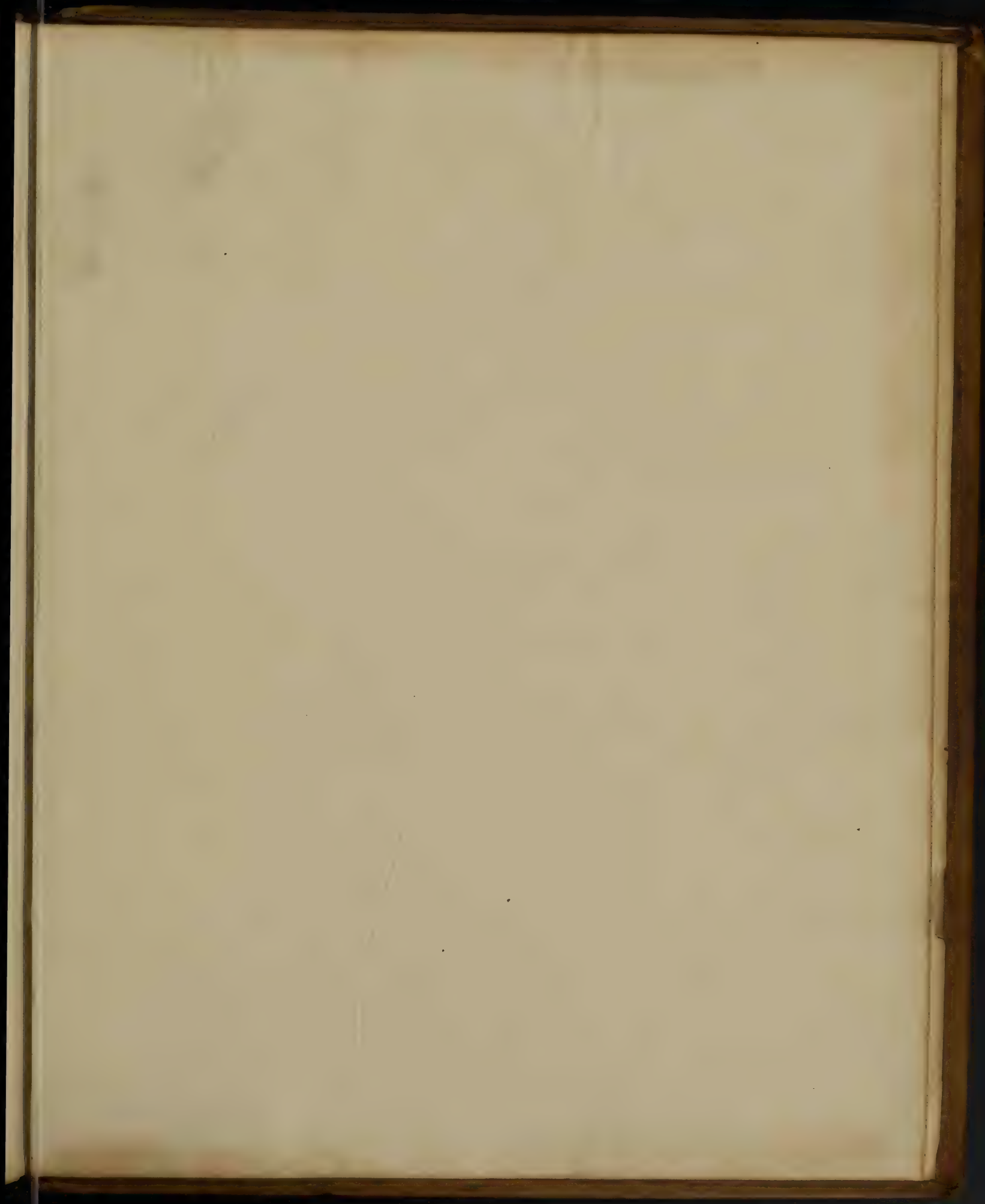


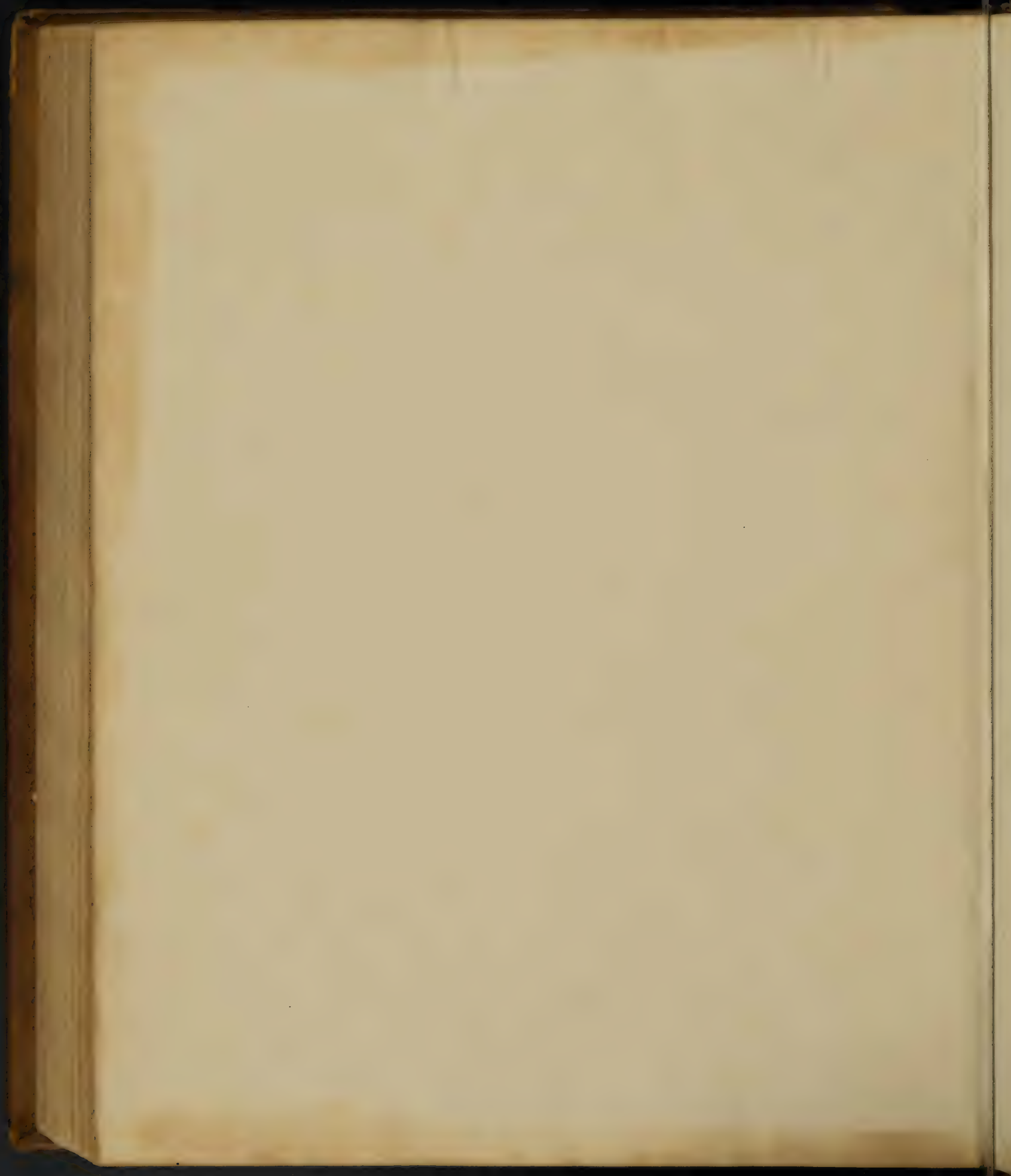


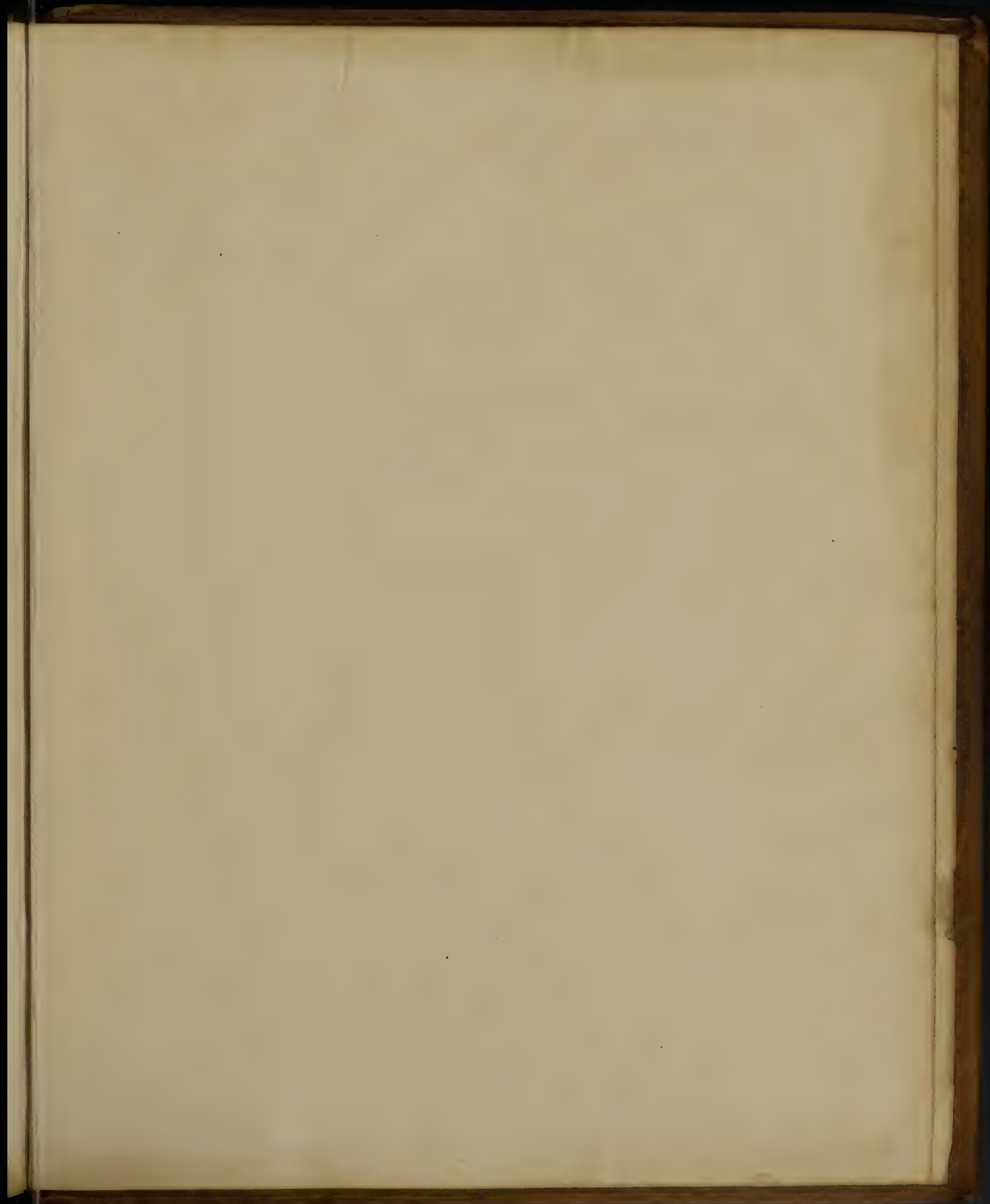


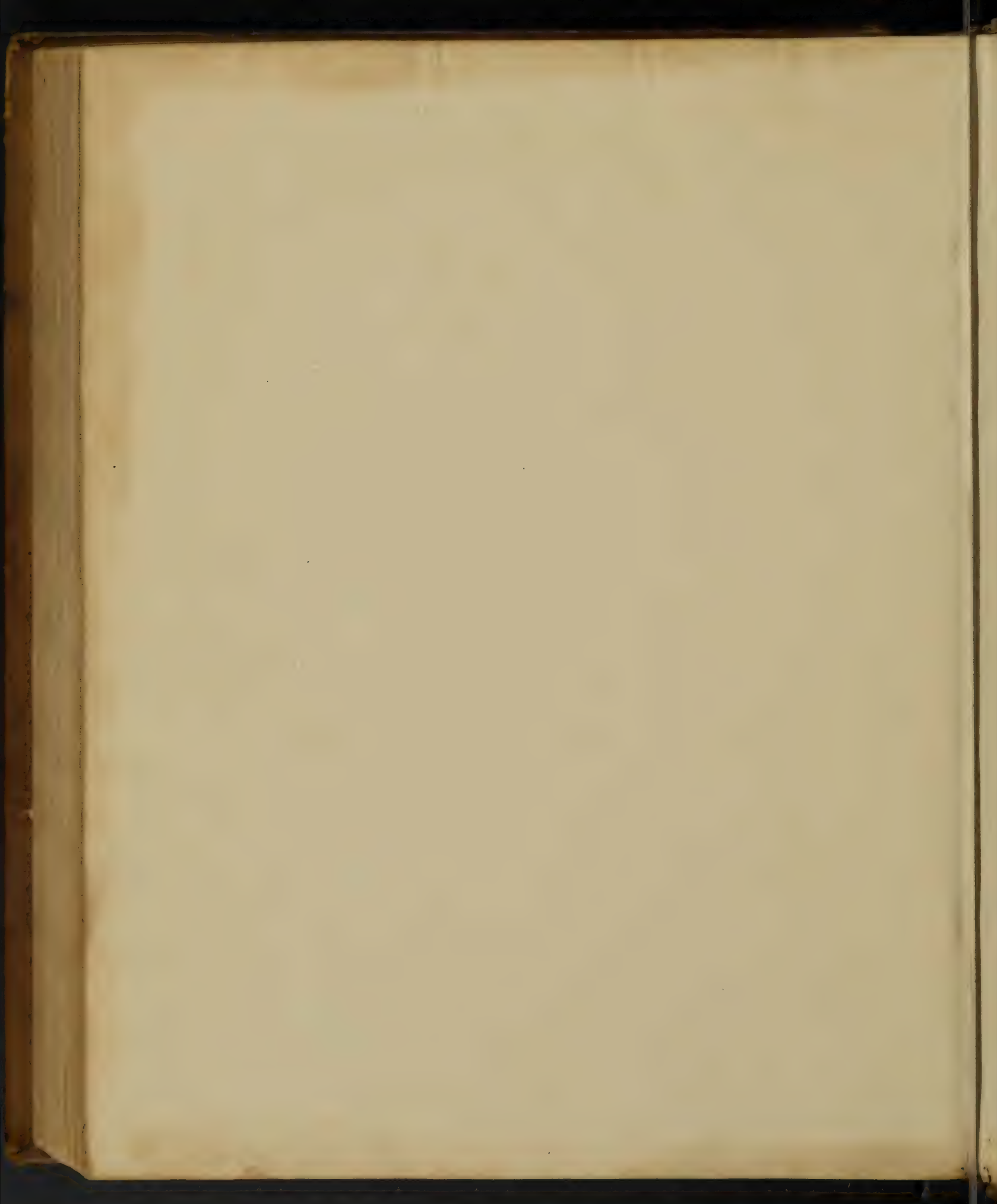






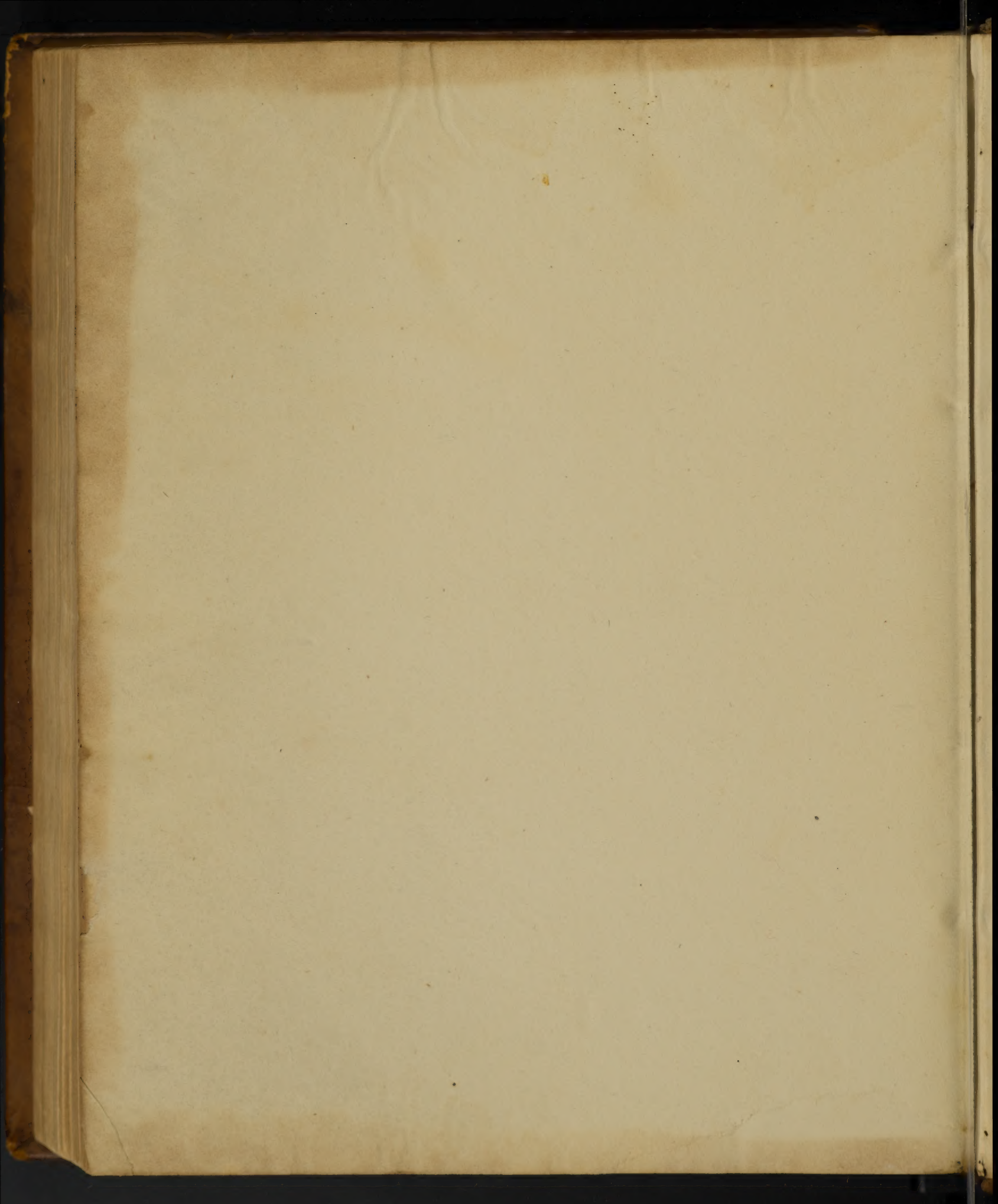






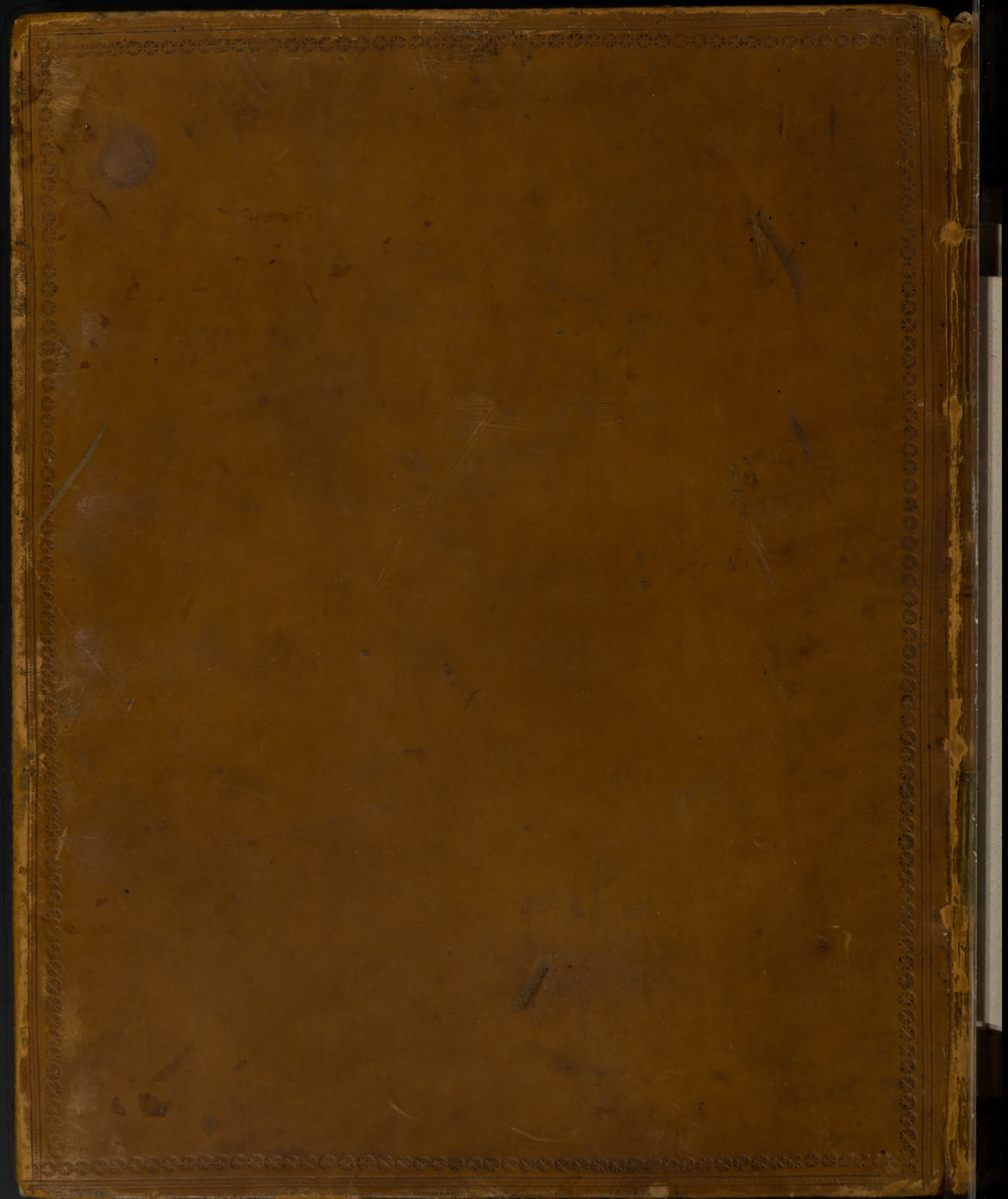
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